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THE

Under-Sheriff:

CONTAINING

The OFFICE and DUTY

Of High-Sheriffs, Under-Sheriffs and Bailiffs, in the following Order, *viz.* Arreſt, County-Court, Bail, Return of Writs, *Venire facias*, *Habeas Corpora Juratorum*, *Diſtringas*, Juries, *Habeas Corpus*, Writs of Inquiry, Gaols and Priſoners, Execution, Reſcue, Eſcapes, Falſe Impriſonment, Sheriffs of *London* and *Middleſex*, Aſſizes and Seſſions of the Peace, Fees, Bonds, Covenants, *&c.* Members of Parliament, Sheriff's Accounts.

WITH AN

APPENDIX of PRECEDENTS,

Never before PUBLISHED.

By a GENTLEMAN of the *Inner-Temple*.

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THE

THE
Under-Sheriff.

INTRODUCTION.

MADOX, the author of the *Hiſtory of the Exchequer*, in his notes on the antient dialogue of the *Exchequer*, which is added at the end of that hiſtory, gives us the following curious account of the name and office of ſheriff, and of the appointment of that officer: His words are, "He was called ſheriff, becauſe he acted in the earl's ſtead; but in what ſenſe, or in what reſpect he acted, is indeed doubtful." The learned author of the dialogue here ſays, "That the ſheriff ſupplied the ſtead of the earl in thoſe pleas, of which the earl, by reaſon of his dignity, partook [with the King]; *and he hints, that he took his name of ſheriff from thence.*" Many of the latter authors have followed his opinion; but we may conſider the matter again. It is certainly true, that the ſheriff did hold the pleas of the county of which he was ſheriff; but did he he hold thoſe pleas in the ſtead or place of the earl? He indiſputably held them in the ſtead of the King, as having the care and cuſtody of the county intruſted to him by the King himſelf. For in *England* the ſheriff was the King's ſervant, not the earl's. It is alſo true, that the third penny of the pleas of the county, was uſually granted

Name, office, and appointment of ſheriff.

to the earl by the King, upon his being created an earl; which third penny was called creation money. But whether the earl partakes of it with the King, by reaſon of his dignity in the pleas of the county, as the famous author here ſuppoſes, I know not; but one inſtance, as I remember, is to be met with in the antient remembrances, where the earl's third penny is called part of his county. That inſtance is in the earl of *St. Patrick*, and is thus: "*Wiltſhire*; The earl of *St. Patrick* accompts for *thirty-eight* pounds and *nine* ſhillings and *three* pence, blank of old ferme: *twenty-two* pounds and *ſixteen* ſhillings and *ſeven* pence to the earl of *St. Patrick* for his part of the county by *tale*; and *eighteen* pounds blank by *Warin*, ſon of *Gerold*, by the King, out of reſpect this year. And he has *twenty-three* ſhillings and *ſeven* pence blank ſurpluſage. And the ſame ſheriff accompts for the new ferme: in the treaſury, *&c.* and *twenty-two* pounds and *ſixteen* ſhillings and *ſeven* pence by the King's writ to the earl of *St. Patrick*, for the third penny of the county. *Great Roll*, 3 *H.* 2. *R.* 3. *a.* What follows from hence? The earl indeed is ſo far ſaid to partake with the King, as he has one part of the fines of the county; namely, a third, and the King another; namely, two thirds. He partakes, I ſay; but not in all likelihood by reaſon of his dignity: for it is clear, that the royal bounty beſtowed the third penny on the earl, and therefore is ſometimes called an annual fee of the county; as if it was a gift from the King's munificence. Concerning this, ſee *Mad. hiſt. of the Exch. chap.* 23. *ſect.* 2. 13 *Ed.* 1. and the petition of *Hugh de Courteney* to *Iſabel* his ſiſter; and *ibid.* 26 *Ed.* 1. And indeed, as the third penny was paid to the earl by the hands of the ſheriff, there is no reaſon to believe he was his ſubſtitute. It ought likewiſe to be remembered, that ſome times the ſame perſon was, if the King was pleaſed to have it ſo, both earl and ſheriff of the county. For example, *Richard*, earl of *Devonſhire*, was the King's ſheriff of the ſame county, in the *ſecond* year of King *Henry* the *ſecond*. *Richard*, the earl, accounts for the ferme of *Devon-*

ſhire. Great Rol. 2 *Hen.* 2. *Rol.* 10. As *St. Patrick*, earl of *Saliſbury*, or *Wiltſhire*, was the King's ſheriff, or fermer of *Wiltſhire*, in the *fourth*, and alſo in the *fifth* year of King *Henry* the *ſecond*. The earl of *St. Patrick* accounts for the ferme of *Wiltſhire*,—and *twenty-two* pounds and *ſixteen* ſhillings and *ſeven* pence to the earl of *St. Patrick* for the *third* penny of the county. *Great Rol.* 4 *H.* 2. *Rol.* 2. *a.* The earl of *St. Patrick* accounts for the ferme of *Wiltſhire*,—and *twenty-two* pounds and *ſixteen* ſhillings and *ſeven* pence to the earl of *St. Patrick* for the third penny of the county. *Great Rol.* 5 *H.* 2. *Rol.* 6 *a. Geoffry*, ſon of *Peter* earl of *Eſſex*, was ſheriff of *Eſſex* and *Hertfordſhire*, and enjoyed the *third* penny of the former of the two counties, in the *fourth* and *fifth* years of King *Richard* the *firſt*. *Geoffry*, ſon of *Peter Richard de Herriet*, accounts for *forty-five* pounds and *two* ſhillings and *ſix* pence, blank of the old ferme of *Eſſex* and *Hertfordſhire*: He has delivered it into the treaſury, and has his *quietus*; and the ſame for the new ferme; that ſum in the treaſury; and *forty* pounds and *ten* ſhillings and *ten* pence by *tale*, to *Geoffry*, ſon of *Peter*, for the *third* penny of the county; and *eighteen* pounds and *nine* ſhillings and *nine* pence, to the ſheriff himſelf in the town of *Hertford*, for the cuſtody of the caſtle of *Hertford*, &c. *Great Rol.* 4 *Rich.* 1. *Rol.* 1. *a. Great Rol.* 5 *Rich. Rol.* 1. *a. m.* 1. tit. *Eſſex* and *Hertfordſhire*, word for word. *William*, earl of *Saliſbury*, was the King's ſheriff of *Wiltſhire*, in the *eighth* year of King *Richard* the *firſt*. *William*, earl of *Sal*[*iſbury*], *Thomas*, ſon of *William*, accompts for the ferme of *Wiltſhire*; that ſum in the Treaſury on account thereof, &c. *Great Rol.* 8 *Rich.* 1. *Rol.* 2. *a. William de Warren*, earl of *Surry*, was ſheriff of that county, in the *ninth* year of King *Henry* the *third*. *William Warren*, earl of *Surry*, *William de Mara*, as warden of it, accounts for one *hundred* and *ſeventy* four pounds and *ſeven* ſhillings, blank for the ferme of the county, *Great Rol.* 9 *H.* 3. *Rol.* 3. *a. m.* 1. *Surry*, and the ſame the *tenth* year. *William de Warren*, earl of *Surry*, *William de Mara*,

as warden of it, accounts for one *hundred* and *ſeventy* four pounds and *ſeven* ſhillings blank for the ferme of the county. *Great Rol.* 10 *H.* 3. *R*——. *m.* 1. *Surry.* *Hubert de Burgh*, earl of *Kent*, was ſheriff of that county the *eleventh* year (and other years) of King *Henry* the *third*. *Hubert de Burgh*, *William Binte* as warden of it, accompts for that ſum of the ferme of the county;—and *fifty* pounds of the *third* penny of the county by the King's writ to *Hubert de Burgh*, earl of *Kent*. *Great Rol.* 11 *H.* 3. *Rol. a.* 1. tit. *Kent*. *Edward*, the King's eldeſt ſon, (a few years afterwards King of *England*) was ſheriff of the counties of *Buckingham* and *Bedford*, the *fifty-ſecond* and *fifty-third* years of King *Henry* the *third*. *Edward*, the King's eldeſt ſon, *Bartholomew le Joevene*, his under-ſheriff, accounts for *three hundred* aud *ſeventy-nine* pounds and *nineteen* ſhillings and *ten* pence blank on account thereof; and of *one hundred* and *eight* pounds by *tale* of the ferme of the counties; and for [the ſame ſums] of the ſame for the year paſt. *Great Rol.* 53 *H.* 3. *Buck.* & *Bedf. m.* 1. *b.* but I do not apprehend we are to ſuppoſe, that lord *Edward* the heir apparent (as we call him) of the crown of *England*, was the ſubſtitute of any earl. Hither alſo may the ſheriffs in fee, or hereditary ones, be referred, upon each of which we cannot dwell. From theſe, and the like inſtances, it ſeems probable, that the ſheriff was the King's, not the earl's deputy. But I forbear ſpeaking any more concerning the earl: I return to the ſheriff, in order to ſpeak a little of his name and office.

I will not conſider what explanations the gloſſariſts put on the word *vicecomes*, (ſheriff); the reader may conſult them, if he pleaſes, at his leiſure. I am deſirous of adding a conjecture in regard to this matter, which no one of my countrymen has hitherto attempted as I know of; but it muſt be left to the reader's judgment. He is therefore called *vicecomes*, (ſheriff) becauſe *vice fungitur comitis*; he officiates in the ſtead of the earl, that is, the prince. Firſt, we muſt obſerve, that formerly the chief governors of certain provinces were earls, as the antient and preſent

ſent Kings of *England*; for the princes of *Normandy*, and of many other provinces, were diſtinguiſhed by the title of earls, and then of dukes; as may be ſeen in the antient hiſtory of thoſe provinces. They were officers of antient inſtitution, inveſted with great power by theſe earls, to defend and govern particular diſtricts of their country; who becauſe they repreſented their earl, that is, their prince, each in his diſtrict, and acted in his ſtead, were called ſheriffs from theſe earls. The writers of the annals of *Flanders* maintain this explanation in eloquent terms: they affirm, that the antient princes of *Flanders* inſtituted ſome hereditary offices, and annexed them to fees; that is, ſome for the performance of the ſervices hereunder mentioned, and ſome for the adminiſtration of juſtice to their ſubjects; of which ſort were the ſheriffs, who were ſo called, becauſe the earls (or princes) granted them their places to govern the burghs and cities, and alſo other privileges and powers, ſuch as the addition of conſtables of caſtles, *&c.* I refer the reader to *Adrian Barland*, and others, who wrote concerning the remarkable occurrences of *Belgia*. The *Greeks* call it *Burgh*, or Πυργον, a furniſhed tower. Indeed the princes of *Flanders* (before they took the name of *Burgundy* and *Auſtria*) formerly inſtitued offices annexed to fees, that they might deſcend to their heirs. Some were appointed to reſtore every one to his right; here, amongſt others, were comprehended the ſheriffs, that is, thoſe to whom the earls granted their places in the government of burghs and citadels, with the addition of privileges and advantages: whence alſo they were called governors of caſtles. Others, for the domeſtick accounts and revenues of the prince; others, for military employment. This was the conſtable's duty. *Hamyrallus* and *Marſcalcus* are to the ſame purpoſe.

Adrian Barland, and others, concerning the remarkable affairs of *Belgia*, *p.* 77, ſay, It was ſo, not only in *Flanders*, but alſo in other countries, as in *Normandy*, *&c.* in almoſt the ſame manner; becauſe the ſheriff acted in the ſtead of the earl or the

prince. And, that the deſcription of the ſheriff, which I have partly above referred you to, and partly quoted from *Barland*, exactly agrees with the antient office of the ſheriff, as it was after the *Norman* conqueſt; for not only the cuſtody of the county, but alſo the trouble of pronouncing juſtice, and defending the King's caſtles, was entruſted to the *Anglo-Saxon* ſheriff by the King, by antient cuſtom; as is ſhewn in many inſtances in *Mad. Hiſt. Exch.* The cuſtom was the ſame in *Normandy*. There were certain judges who were called ſheriffs as *Dueren* affirms, whom (that is to ſay, the judge) he calls earl, becauſe it was the name of his office. Hence the name of ſheriff, and ſome judges are to this day called ſheriffs in *Normandy*. *Dueren*, in the *Cuſt. Feuds*, *c.* 20. *ſect.* 3. As to the *Engliſh*, I am apt to think the office of ſheriff (as it ſtood after the conqueſt) was brought into *England* by the *Norman*. The name of ſheriff, together with his office, was eaſily changed from the dominions of earls to thoſe or Kings. That diviſion of the country in the time of the *Anglo-Saxons*, was called among the *Engliſh*, *ſhire*; which was afterwards called *county* by the *Anglo-Normans*. And the officer among the *Anglo-Saxons* was called the governor of the ſhire, or the royal governor; whom the King entruſted with the cuſtody or ſuperintendency of the ſhire. The ſheriff ſucceeded ſome time after the conqueſt; but very different, if I am not miſtaken, in power as well as in the nature of the office, as may appear from a compariſon of each office. But though the office was changed, the antient name of *ſhrieve* remained; and the *Norman* name of ſheriff took place at the ſame time.

It will be of uſe to ſpeak a little, in this place, of the manner of appointing a ſheriff; and the rather, becauſe ſome authors have not wrote a true account of the matter. The ſheriffs of counties, after the *Norman* conqueſt, were appointed at the King's pleaſure; ſome for a quarter of a year, ſome for half a year; others (which was moſt uſual) for a year; others, from year to year, for many years together; and

and ſome others, (if the King pleaſed) by an hereditary right. The counties were committed to ſome as fermers, to others as wardens, or (as they were called) approvers. But each of them was immediately ſubject, and anſwerable to the King; neither is it to be wondered at, for each in his county was almoſt uſually the chief collector of the royal revenue, the King's itinerant juſtice for determining pleas, aſſeſſing of tallages, &c. and at the ſame time keeper of the King's caſtles, and conſervator of his manors. Therefore what the learned *Henry Spelman* ſays (in his *Gloſſary*, *p.* 555, *col.* 1.) at the word *vicecomes*, (ſheriff) ſeems to me to be falſe. He ſays, The ſheriffs formerly were uſually choſen by freemen in the county court, juſt as the members of parliament are at this day. For it is clear, it was very differently ordained after the *Norman* conqueſt. From which time we grant, that all ſheriffs of counties were appointed ſolely by the King; unleſs he was pleaſed to allow ſome the privilege of chooſing their own ſheriffs, as in *London*. The ſheriffs of counties were uſually appointed in this manner, until it was enacted by ſome ſtatutes, (as by the ſtatute of *Lincoln*, of the *ninth* year of King *Edward* the *ſecond*, and the ſtatutes of the *fourteenth* year of King *Edward* the *third*, *chap.* 7. and of the *twelfth* year of King *Richard* the *ſecond*, *chap.* 2.) by which it is enacted, that they ſhall be named by the King's council at the *Exchequer*, on the morrow of *All Souls* * in every year, to be afterwards choſen and appointed by the King himſelf; which method remains to this day. *Anc. Dial. Exch. B.* 1. *chap.* 17. *p.* 31. *b. note (q) edit.* 1758.

The ſheriff and the county being correlative, I ſhall give a few obſervations about *counties*, what they were originally.

Counties, (a word taken from the *French*) or *Shires* (a word taken from the *Saxons*) are certain circuits Counties.

* But now on the morrow of St. *Martin*, by ſtat. 24 *Geo.* 2. *c.* 48. *ſect.* 11. but it may be adjourned to another day. *Cro. Car.* 595.

and parts of the kingdom, into which the whole realm was divided for the more convenient government thereof, and is governed by a yearly officer, whom we call Sheriff, which is compounded of two *Saxon* words, *Shire* and *Reeve*, *Reeve* ſignifying a *Governor*. *Rol. Rep.* 237. 5 *Co.* 35. *Dalt. Sher.* 2.

When this realm was divided into counties.

As for the time when and by whom this realm was divided into counties, authors ſeem to differ. *Co. Lit.* 168. holds, that they were divided by the *Britains*; but it is generally held, (as *Ingulph. &c.*) that they were divided by King *Egbert*, or *Ælfred*: but though *Egbert* united the *heptarchy*, yet he was not the firſt who divided the kingdom into counties, nor *Alfred* neither, as ſome imagine. For, as Mr. *Selden* obſerves, about the year 700, (an hundred years before *Egbert*) one of *Ina*'s laws was, If any Aldeiman, *i. e.* ſheriff, were guilty of an eſcape, he loſt his county. Therefore *Ingulphus* meant, that King *Ælfred* did divide it into hundreds, or elſe made a more punctual diviſion than was before. *Pref. to* 9 *Co. Dalt. Sher.* 5.

County Palatines.

Of theſe counties there be four of ſpecial mark, which are termed *county palatines*, *viz.* of *Lancaſter*, of *Cheſter*, of *Durham*, and of *Ely*; and the chief governors of theſe county palatines, by ſpecial charter from the King, did all things heretofore touching juſtice abſolutely, and in their own name; but by the ſtat. 27 *Hen.* 8. *chap.* 24. this power of theirs is much abridged. *Vaugh.* 418. *Dalt. Sher.* 2.

Counties corporate, &c.

There are alſo counties corporate, and theſe be certain cities, or antient boroughs and vills, upon which our Kings formerly beſtowed ſuch extraordinary liberties, as the cities of *London*, *York*, *Cheſter*, and *Canterbury*; the towns of *Kingſton* upon *Hull*, *Litchfield*, and *Haverfordweſt*, &c. *Co. Lit.* 109.

The

The Counties in *England* and *Wales*, viz.

In *England*, 39.

Bedford.
Berks.
Bucks.
Cambridge.
Cornwal.
Cumberland.
Derby.
Devon.
Dorſet.
Durham.
Leiceſter.
Lincoln.
Middleſex.
Monmouth.
Norforlk.
Northampton.
Northumberland.
Nottingham.
Oxon.
Rutland.
Eſſex.
York.
Glouceſter.
Hereford.
Heriford.
Huntingdon.
Kent.
Lancaſter.
Weſtmoreland.
Worceſter.
Salop.
Somerſet.
Stafford.
Suffolk.
Surrey.
Suſſex.
Southampton.
Warwick.
Wilts.

In *Wales*, 12.

Angleſy.
Brecon.
Cardigan.
Carmarthen.
Carnarvan.
Denbigh.
Flint.
Glamorgan.
Merioneth.
Montgomery.
Pembroke.
Radnor.

The Cities and Towns in *England*, which have Sheriffs, are as follow:

The Cities of	*Briſtol*, — —	2
	Coventry, — —	2
	Canterbury, ——	1
	Cheſter, — —	2
	York, —— —	2
	Exon, —— —	2
	Glouceſter, — —	2
	Litchfield, — —	1
	Lincoln, — —	2
	London, — —	2
	Norwich, — —	2
	Worceſter, — —	1
The Towns of	*Kingſton* upon *Hull*,	1
	Southampton, —	1
	Nottingham, —	2
	Poole, —— —	1
	Newcaſtle upon *Tyne*,	1

CHAP.

CHAP. I.

High-Sheriff.

IN *Rol. Rep.* 237. it is ſaid, *That the Sheriff is a great conſervator of the peace*, ſo that at this day the ſheriff hath all the authority for the adminiſtration and execution of juſtice, which the *Earl* had, the King by his letters patents now committing to the ſheriff *the cuſtody of the county*. 9 *Co.* 49. The ſheriff has the cuſtody of the county.

The ſheriff at common law was eligible by the freeholders of the county, as the coroner is at this day; and then by the death of the King, his office was not determined, no more than the coroners is now. 2 *Brownl.* 282. 2 *Inſt.* 558. *&c.* Sheriffs were eligible by the County. 4 *Bac.* 431. *queres* this.

The gentlemen of the privy chamber are not elegible to the office of ſheriff, at leaſt, they are not obliged to ſerve. Quere whether they may? Gentlemen of the privy chamber, not elegible.

The ſheriff takes place of every nobleman in the county, during the time he is ſheriff; and though the ſheriff be not a juſtice of peace, yet he is a conſervator of the peace, and by this he may well impriſon a man upon good cauſe. 2 *Rol. Rep.* 237. Takes place of noblemen.

At common law the ſheriff may commit any one for an affront, or breach of the peace, in his preſence. *Hale's P. C.* 186, 187. *Edit.* 1755. Commitments by him.

Such perſons as he ſhall apprehend upon ſuſpicion of treaſon or felony, upon freſh ſuit or hue and cry, he may commit to the gaol. Perſons apprehended on hue and cry.

Upon any foreign invaſion he may raiſe the power of the county; ſo upon rebellions and inſurrections; and may command any number he thinks fit to aid him. He may raiſe the power of the county.

But of his own authority he ſhall not arreſt any man upon ſuſpicion of felony, except there be a felony committed in fact, and he himſelf have ſuſpicion of him. Upon felony committed.

By

By the common law, the ſheriff is the ſame officer to the court of *King's Bench*, as the conſtable is to the Juſtices of the peace. *Salk.* 175. 2 Ld. *Raym.* 1195. *Forteſc. Rep.* 129.

May ſuppreſs Rioters, &c.

The ſheriff may raiſe the power of the county to ſuppreſs rioters, and commit them to priſon. *Stat.* 17 *R.* 2. *c.* 8. *H. H. P. C.* 496. and if the rioters reſiſt, the ſheriff and his aſſiſtants may juſtify the killing them. 13 *Hen.* 4. *c.* 7. *T. Raym.* 386. *Stat.* * 2 *Ed.* 3. *c.* 3. 13 *Ed. c.* 39.

May arreſt and impriſon them.

Whereſoever the ſheriff, or any other of the King's officers may take the power of the county, or have authority either to execute the King's proceſs, apprehend felons, rioters, &c. if they ſhall find reſiſtance, they may arreſt and impriſon all ſuch offenders.

What the ſheriff may do as conſervator of the peace.

He hath *the cuſtody of the county*, and therefore for cauſe he may commit: He is *conſervator of the peace*, and *St.* 1 *Mar. ſt.* 2. *c.* 8. *ſect.* 2. doth not take away any power from the ſheriff; only if he was in commiſſion of the peace before, he is to forbear the execution of his commiſſion for the peace ſo long as he is ſheriff, but he is not to forbear the execution of that which is committed to him for the county by the common law.

When he may commit Perſons carrying Weapons, &c.

The ſheriff if he ſee a perſon carry weapons in the highway *in terror of the people*, may commit him, though he does not break the peace in his preſence. One *Clare* was committed to the counter of *Woodſtreet*, and made his eſcape; the defendant being one of the ſheriffs purſued him, and in his purſuit met with plaintiff in the night-time *wandring*, who purſued him indecently, and gave him uncivil

The ſheriff favoured in the execution of his office.

* This ſtatute prevents perſons riding or going armed; but at this day it is held, that the wearing of arms upon the road, is not within the meaning of this ſtatute, unleſs it be accompanied with ſuch Circumſtances as may reaſonably create terror, and that perſons of quality may arm their attendants as well as themſelves, for their greater ſecurity in travelling. 5 *Read. Stat. Law* 77. *Hawk. Pl. Cr.* 136. *ſect.* 9.

words,

words, *and puſhed him up againſt the wall*; whereupon he impriſoned him, and juſtifies in *falſe impriſonment*. He doth not ſay he did it *violently*, or *againſt the Peace*, or knowing him to be ſheriff: But by the court, it ſhall be intended he did it *maliciouſly*, and the law implies it was done with *force and arms*. It is a good juſtification. Had the defendant done it by chance and unwillingly, he might have pleaded it, and his not pleading it ſhews it to be otherwiſe. 2 *Bulſt.* 329. But the *mayor of Barſtaple* juſtified the committing a man, for that he did miſbehave himſelf againſt him by ill words, *&c.* Had this been laid to be done in the execution of his office, it had been good; but Mr. *Mayor* was then playing at tables. See *Saund.* 79. In an action of treſpaſs, battery and impriſonment, the defendant juſtified ſpecially, as being one of the ſheriffs of the city of *Coventry*, guarding the gaol and priſoners, *&c.* and the plaintiff came there and ſtruck him, *whereby* he impriſoned the plaintiff, *&c. and this*, *&c.* and becauſe the defendant had ſaid nothing to the *force and arms*, the plaintiff demurred to the plea, yet judgment was given, *that the plaintiff take nothing by his Bill.*

Juſtification in falſe impriſonment.

The like for aſſaulting himſelf.

Anciently the biſhop, with the ſheriff, went in circuit twice every year through every hundred within the county. 2 *Inſt.* 70.

Biſhops and ſheriffs.

The King cannot reſtrain any part of the ſheriff's power, neither can the King chooſe a ſheriff contrary to the *St.* 9 *Ed.* 2. *ſtat.* 2. The office of ſheriff is entire, and cannot be apportioned. Though the King conſtitutes a ſheriff *during pleaſure*, and may determine it at will, yet he may not determine it in part, nor abridge him of any thing incident to his office. *Hob.* 13. 4 *Co.* 33. *T. Raym.* 363.

The office of ſheriff is entire.

The ſheriff is an officer of that eminence, confidence and charge, that he ought to have all right pertaining to his office, and ought to be favoured in law before any private perſon. 4 *Co.* 33.

Sheriff favoured in law.

In as much as eſcapes are ſo penal to officers, the judges have always made as benign conſtruction as the law will permit in favour of *ſheriffs*, and to the intent

intent that every one may bear his own burden, they will never judge an eſcape by ſtrict conſtruction. As if one in execution eſcape and fly into another county, and the ſheriff retake him on freſh purſuit, it is no eſcape, if it be before action brought. So if the ſheriff by *Habeas Corpus* be commanded to bring the body at the day, he ſhall not be compelled to take the moſt direct way but the ſafeſt.

Freſh purſuit.

Carrying a man upon an *Habeas Corpus*.

The ſheriff is not puniſhable for executing the proceſs of the court, though it be erroneous.

Erroneous proceſs.

If any ſheriff, under-ſheriff, ſerjeant or officer who hath execution of proceſs, be ſlain in doing his duty, it is murder in him who kills him, although there were not any former malice between them; and if there were error in award of proceſs, in the miſtake of one proceſs for another; as a *Capias* in debt againſt a peer; and an officer be ſlain in the execution thereof, the offender ſhall not have advantage of ſuch error, no more than a ſheriff who ſuffers a priſoner to eſcape, ſhall take any advantage of error thereby. And in this caſe there needs not a ſpecial indictment to be drawn; but a general indictment, that ſuch a party *of his malice aforethought ſtruck, &c.* for the law preſumes malice, though none be proved; ſo it is if any ſhall come in aid of them; and an officer, if he be reſiſted, is not bound to fly to the wall, as other ſubjects are. *Cro. Jac.* 280. *pl.* 10. 9 *Rep.* 66.

Killing of the ſheriff in doing his duty is murder.

Several perſons were informed againſt for aſſaulting the ſheriff in ſerving an execution, and fined Sir *J. Wingfield* the priſoner at 500 *l.* and *Brady* 500 marks, becauſe it appeared upon the evidence he drew his ſword and wounded the ſheriff, and by that means the priſoner eſcaped into *Neale*'s houſe; and 180 *l.* againſt *Neale*, becauſe he kept out the ſheriff, and ſhut the door againſt him; and 500 againſt Sir *J. B.* becauſe he was the means of conveying away the ſaid priſoner to *Lincoln's Inn*; and by the court, ſuch fines aſſeſſed in court by judgment on *Information*, cannot be afterwards qualified or mitigated. *Cro. Car.* 251.

Severe fines for aſſaulting the ſheriff.

The

The ſheriff's bailiffs lawfully arreſted a man, if the perſons which ſtood by refuſed to aſſiſt them, (in caſe of oppoſition) they ſhall be fined. *Winch* 72. For refuſing to aſſiſt him or his bailiffs.

Every man is bound by the common law to aſſiſt, not only the ſheriff in his office for the execution of the King's writs according to law; but alſo his bailiff that hath the ſheriff's warrant in that behalf, hath the ſame authority which his maſter hath: nor the ſheriff cannot do all himſelf, and if they do it not, being required, they ſhall be fined and impriſoned; but in the caſe of *replevin* out of a caſtle, houſe, *&c.* before the ſheriff uſeth any force, he ought to demand (according to law) the goods to be delivered, ſo as replevy may be made thereof; for *force ought to follow, not precede the law.* 2 *Inſt.* 193. The reaſon thereof.

The ſheriff, or his miniſters, in the execution of juſtice, may carry an hand-gun, and it is no offenſe againſt ſtat. 33 *Hen.* 8. *c.* 6. 5 *Co.* 71. May carry weapons.

The ſheriff in ſome caſes ſhall not be a diſſeiſor for executing the King's writ, though he doth wrong, for officers in ſuch caſes are excuſed by their warrant, the ſheriff on an *Hab. Fac. Seiſ.* cannot return that another is tenant of the land by right, for that cannot come in iſſue between the demandant and him. 6 *Co.* 52. Excuſed in doing wrong.

The life of the party abſent, during whoſe life defendant has a leaſe, may be examined and inquired of by the ſheriff or other, as the court thinks fit. *Sid.* 61. *pl.* 30. *Keb. Rep.* 176. *pl.* 137. May inquire of the life of an abſent perſon.

It is holden, that a ſheriff cannot be elected knight of the ſhire for that county for which he is ſheriff. *Lit. Rep.* 326. Sir *Sim. D'Ewe's Journ.* 38, 436. 4 *Bac. Abr.* 434. Not to be member of parliament.

No man ſhall ſerve the King as ſheriff of any county above one year, and that notwithſtanding any clauſe of *Non obſtante* to the contrary; that is, notwithſtanding the King ſhould expreſly diſpenſe with that ſtatute. And yet it is agreed, that Shall not ſerve above one year.

But ſee 2 *Hawk. P. C.* 390. where the contrary opinion is holden, and the reaſons of the following authorities, *viz.* 7 *Co.* 14. *Finch* 234. *Plowd.* 502. *Dalt. Sher.* 22. are refuted. 4 *Bac. Abr.* 434.

againſt

againſt the expreſs purview in the act, the King may by a ſpecial *Non obſtante* diſpenſe with that act, (except ſuch as are inheritable to the office of ſheriff, or other offices in *London*; and that they may execute their office during *Michaelmas* and *Hilary* term, if no writ of diſcharge come. *Stat.* 14 *Ed.* 3. *c.* 7. 23 *Hen.* 6. *c.* 8. 42 *Edw.* 3. *c.* 9.

How to be reſident.

Every ſheriff is to be reſident in his own perſon within his county during the time he is ſheriff, (except he be otherwiſe licenſed by the King) by 4 *Hen.* 5. *c.* 5.

Hath no power in another county.

A ſheriff of one county hath no authority or power within another county; yet the ſheriff by force of the king's writ may carry the priſoner through ſeveral counties, or make freſh purſuit into other counties, and the priſoner ſhall be ſaid to be in the cuſtody of the firſt ſheriff in every county. 4 *Bac. Abr.* 435.

Not to let his county to farm.

The ſheriff is not to let his county to farm; by the ſheriff's letting his county to farm, is underſtood of the profits of the county, which were conſiderable, when moſt law ſuits were tranſacted in the counties and in hundred courts, fines, iſſues and amerciaments being conſiderable. 23 *Hen.* 6. *c.* 10. And in the time of *Hen.* 3. the *bailiwick* of one county was let at 100 *l. per annum*, a great ſum in thoſe days. There was a bond for rent on a leaſe of the *bailiwick* of the *Savoy*. Now the *Stat.* 27 *Hen.* 8. *c.* 24. being a general ſtatute, and the concluſion general againſt the form of the ſtatute, will avoid this contract, by 23 *Hen.* 6. The ſecurity is void, though it hath no expreſs words to avoid it; but by the court, 23 *Hen.* 6. being a particular law, ſhould have been pleaded, and the *Stat.* 27 *Hen* 8. is but a relative ſtatute. 3 *Keb. Rep.* 678. *pl.* 55. The letting to farm offices is *malum prohibitum*, againſt the *Stat.* of 4 *Hen.* 4. *c.* 5. and alſo *malum in ſe*, and therefore, becauſe the ſheriff of *Nottingham* took money for the gaolerſhip, and the *bailiwick* of the county for one year, he was fined in the *Star-Chamber*. The penalty for offending

Theſe

theſe laws is 40 *l.* *Mo.* 781. *Noy Rep.* 102. *Freem. Rep.* 19. ſee 5 *Ann. c.* 31. *ſ.* 8.

"It ſhall not be lawful for any perſon to buy, ſell, let, or take to farm, the office of under-ſheriff or deputy-ſheriff, ſeal-keeper, county-clerk, ſhire-clerk, gaoler, bailiff, or any other office pertaining to the office of high-ſheriff, or to contract for any of the ſaid offices, on forfeiture of 500 *l.* one moiety to his majeſty, the other to ſuch as ſhall ſue in any court at *Weſtminſter* within two years after the offence." *Stat.* 3 *Geo. c.* 15. *ſect.* 10. Penalty of buying or ſelling any office under a ſheriff.

"Nothing before in this act ſhall hinder any high-ſheriff from conſtituting an under-ſheriff or a deputy-ſheriff, as by law he may; nor to hinder the under-ſheriff, in caſe of the high-ſheriff's death, when he acts as high-ſheriff, from conſtituting a deputy; nor to hinder ſuch ſheriff or under-ſheriff from receiving the lawful fees of his office, or from taking ſecurity for the due anſwering the ſame; nor to hinder ſuch under-ſheriff, deputy-ſheriff, ſeal-keeper, *&c.* from accounting to the high-ſheriff for all ſuch lawful fees as ſhall be by them taken, nor for giving ſecurity ſo to do; nor to hinder the high-ſheriff from allowing a ſalary to his under-ſheriff, *&c.* or other officers." *id. ſect.* 11.

Debt brought by a ſheriff againſt his bailiff, on a bond given to the ſheriff to execute all precepts, to arreſt without fraud, to bring in bail-bonds, and to pay to the ſheriff or under-ſheriff one ſhilling and eight pence as a fee for every defendant's name in every warrant in meſne proceſs, and to do ſeveral other things which belong to his duty, to execute his office faithfully, and to indemnify againſt eſcapes. The defendant pleads ſpecially to every particular condition, that he had performed it, and pleads that he paid twenty pence for every name in every warrant on meſne proceſs. The plaintiff replies, that a *Capias* was taken out againſt *J. S.* and a warrant granted, and he did not pay the twenty pence. The defendant rejoins the ſtatute 23 *H.* 6. *c.* 10. and ſtat. 3 *Geo. c.* 15. *ſect.* 10. that no ſheriff ſhall let What is not letting a bailiwick to farm.

or ſet the office of ſheriff, under-ſheriff or bailiff, to farm, &c. Plaintiff demurs.

It was held by the court, that this is a lawful bond of indemnity to the ſheriff, and no letting to farm, and the twenty pence is expreſly allowed as a fee to the ſheriff for the arreſt; beſides, neither of the acts makes the bond void for letting to farm; beſides it is a departure in the defendant to plead firſt he had paid the twenty pence, and then rejoined he ought not to pay it, and he pleads a plea at common law, and then rejoins a ſtatute which is naught. *Forteſc. Rep.* 368.

Departure.

How he may be guilty of homicide.

Though the ſheriff be ſo much favoured and reſpected in the law, and in the very execution of criminals; yet he ſhall be guilty of homicide, for not obſerving the order of law in putting a condemned man to death. 3 *Inſt. c.* 7. *P.* 52. *c.* 101. *p.* 211, 217. *H. H. P. C.* 433, 454, 466, 501. 2 *H. H. P. C.* 411. *Foſt. Cr. Law* 267. ſee *Stat.* 25 *Geo.* 2. *c.* 37. to prevent the horrid crime of murder.

Sheriff to take the oaths of allegiance, ſupremacy, and abjuration.

The ſheriff ſhall within ſix kalendar months after his election, take and ſubſcribe the oaths of allegiance, ſupremacy, and abjuration, in one of the courts at *Weſtminſter*, or at the general or quarter ſeſſion of the place where he ſhall be or reſide, between the hours of nine and twelve in the forenoon, and no other. *Stat.* 1 *Geo. ſt.* 2. *c.* 13. *ſ.* 2. 2 *Geo.* 2. *c.* 31. *ſ.* 3, 4. 9 *Geo.* 2. *c.* 26. *ſ.* 3.

To receive the ſacrament, and ſubſcribe the declaration againſt tranſubſtantiation.

The ſheriff ſhall within three months after his election, receive the ſacrament according to the uſage of the church of *England*, in ſome public church, on the Lord's day, immediately after divine ſervice and ſermon: and in the court where he takes the oath, (as above) he ſhall firſt deliver a certificate of ſuch his receiving the ſacrament, under the hands of the miniſter and church-warden, and ſhall then make proof of the truth thereof by two witneſſes on oath. He ſhall alſo, when he takes the ſaid oaths, make and ſubſcribe the declaration againſt tranſubſtantiation. *Stat.* 25 *Car.* 2, *c.* 2. *ſ.* 2, 3, 9. And likewiſe, before he takes

Muſt take an oath of office.

upon

upon him the exerciſe of his office, an oath for the due execution thereof. *Stat.* 3 *Geo. c.* 15. *ſect.* 18.

I Sir C. P. *knight, do ſincerely promiſe and ſwear, that I will be faithful, and bear true allegiance to his Majeſty King* George. *So help me God.* Stat. 1 Geo. ſt. 2. c. 13. Form of the oath of allegiance.

I Sir C. P. *knight, do ſwear, that I do from my heart abhor, deteſt, and abjure, as impious and heretical, that damnable doctrine and poſition, that Princes excommunicated or deprived by the Pope, or any authority of the See of Rome, may be depoſed or murdered by their ſubjects, or any other whatſoever. And I do declare, that no foreign prince, perſon, prelate, ſtate, or potentate, hath, or ought to have, any juriſdiction, power, ſuperiority, preeminence or authority, eccleſiaſtical or* * *ſpiritual, within this Realm. So help me God.* Stat. 1 Geo. ſt. 2. c. 13. Form of the oath of ſupremacy.

I Sir C. P. *knight, do truly and ſincerely acknowledge, profeſs, teſtify, and declare in my conſcience, before God and the world, that our ſovereign lord King* George *is lawful and rightful King of this realm, and all other his Majeſty's dominions thereunto belonging. And I do ſolemnly and ſincerely declare, that I do believe in my conſcience, that the perſon pretended to be prince of* Wales, *during the life of the late King* James, *and ſince his deceaſe, pretending to be, and taking upon himſelf, the ſtile and title of the King of* England, *by the name of* James *the Third, or of* Scotland, *by the name of* James *the Eighth, or the ſtile and title of King of* Great Britain, *hath not any right or title whatſoever, to the crown of this realm, or any other the dominions thereto belonging; And I do renounce, refuſe, and abjure any allegiance or obedience to him. And I do ſwear, that I will bear faith and true allegiance to his Majeſty King* George, *and him will defend, to the utmoſt of my power, againſt all traiterous conſpiracies and attempts whatſoever,* Form of the oath of abjuration.

* Should it not be *civil?*

which ſhall be made againſt his perſon, crown, or dignity. And I will do my utmoſt endeavour, to diſcloſe and make known to his Majeſty, and his ſucceſſors, all treaſons and traiterous conſpiracies which I ſhall know to be againſt him, or any of them. And I do faithfully promiſe, to the utmoſt of my power, to ſupport, maintain and defend the ſucceſſion of the crown againſt him the ſaid James, *and all other perſons whatſoever; which ſucceſſion, by an act, intituled,* An act for the further limitation of the crown, and better ſecuring the rights and liberties of the ſubject, *is and ſtands limited to the princeſs* Sophia, *electoreſs and dutcheſs dowager of* Hanover, *and the heirs of her body being proteſtants. And all theſe things I do plainly and ſincerely acknowledge and ſwear, according to theſe expreſs words by me ſpoken, and according to the plain and common ſenſe and underſtanding of the ſame words, without any equivocation, mental evaſion, or ſecret reſervation whatſoever. And I do make this recognition, acknowledgment, abjuration, renunciation, and promiſe, heartily, willingly, and truly, upon the true faith of a Chriſtian: So help me God.* Stat. 1 Geo. ſt. 2. c. 13.

Shall receive the ſacrament.

"No perſon ſhall be placed, elected, or choſen, into the office of mayor, alderman, recorder, bailiff, town clerk, common council man, or other office of magiſtracy, or place or truſt or other employment, relating to or concerning the government of any of the cities, corporations, boroughs, *cinque* ports, and their members, and other port towns within this realm, that ſhall not have within one year next before ſuch election or choice taken the ſacrament of the lord's ſupper, according to the rights of the church of *England*; and in default thereof, every ſuch placing election and choice is hereby declared to be void." *Stat.* 13 *Char.* 2. *ſt.* 2. *c.* 1. *ſect.* 12.

It was ſaid by the court, that ever ſince the making hereof, when a freeman who was a diſſenter was choſen alderman of a corporation, he never inſiſted upon the act as an excuſe, but ſubmitted to

a fine. And it was alſo declared in the ſame caſe (which was, whether a diſſenter being choſen ſheriff of *Norwich*, and not having received the ſacrament as the act directs, the election was void, in favour of the elected who declined the office;) that the corporation act never deſigned to exempt diſſenters from bearing offices in the government, but to eſtabliſh a ſucceſſion of perſons who were well affected to it; for otherwiſe it would be an encouragement to ſome men to perſiſt in their nonconformity, on purpoſe to avoid offices of burden and charge, inſtead of bringing them to conform; which was chiefly intended by that ſtatute. And therefore they declared, that he muſt ſubmit to a fine, as others had done. But becauſe one of the Judges (and, as was ſaid at the bar, the lord keeper alſo) was of a contrary opinion (namely, that the defendant was ſufficiently puniſhed by the corporation act, in being diſabled to hold any office or employment of profit, and now to puniſh him by an information, would be a double puniſhment for one offence, which the law will not allow;) therefore there being a *Capias* againſt the defendant *pro fine*, and he now appearing in court, he was fined five Marks and no more. 4 *Mod.* 269. *Gibſ. Cod.* 506, cited in 10 *Mod.* 101.

But four years before, this was adjudged as a good plea, in this caſe, that the being a diſſenter, and unqualified by this act, the election was void; and that the by-law for forfeiting 20*l.* upon refuſal after election did not take place, becauſe the perſon being abſolutely incapacitated by the ſtatute, there was really no election; and ſo he could not refuſe after election. 2 *Ventr.* 247. *Gibſ. Cod.* 506.

Defendant was one of the diſſenters who was choſen ſheriff of *London* and *Middleſex*, and refuſed to take upon him the office; for which an information was moved for againſt him, as it is an office in which the publick are intereſted, and therefore not to be compenſated by a pecuniary ſatisfaction to the city. But upon ſhewing cauſe, the court diſcharged the rule; it appearing that there were acts of com-

mon council that had provided penalties upon refuſers, which is the proper remedy; eſpecially where it is doubtful whether the refuſal is a crime or not, which hath never yet been ſettled. In this caſe the facts are agreed, and the only doubt is in point of law, and therefore more proper for a civil ſuit: and ſo was the opinion of the court, in the caſe of *Shackleton* of *York* in lord *Hardwick*'s time. However they declared, that if after the point was determined againſt the diſſenters, others ſhould refuſe; it might be a foundation to move for an information. 2 *Stra.* 1193.

An action was brought in the ſheriff's court, upon a by-law for the penalty of 600 *l.* againſt the defendant for refuſing to ſerve the office of ſheriff of *London*. The defendant pleaded this ſtatute, that no perſon ſhould be choſen into ſuch office who ſhall not, within one year next before, have taken the ſacrament according to the rights of the church of *England*; and in default thereof, every ſuch choice is declared to be void. The defendant further pleads the ſtatute of 1 *Wil. & Mar. c.* 18. or exempting proteſtant diſſenters from penalties contained in former acts. Then the plea avers, that the ſheriffs of *London* are officers who before the 13 *Char.* 2. were perſons bearing ſuch office; that the defendant was and ſtill is a proteſtant diſſenter from the church of *England*, a perſon of a ſcrupulous conſcience in the exerciſe of religion, and during all that time has and ſtill does frequent the congregation of religious worſhip amongſt proteſtant diſſenters. The defendant then ſtates, that he took the oaths, and ſubſcribed the declaration, according to the act of toleration, in the year 1751, at the ſeſſions held for the county of *Middleſex*; and that his taking the oaths was duly regiſtred in the court of ſeſſions: that he had not within one year before the ſuppoſed election taken the ſacrament of the Lord's ſupper according to the rights of the church of *England*, nor has he at any time ſince done it, nor can he in conſcience take the ſame, nor was he bound to take the ſame ſince *May* 1751: that of theſe premiſſes the lord

mayor, aldermen and citizens had notice; and that by reaſon thereof, and of the act of parliament made for governing corporations, the mayor, aldermen and citizens aſſembled in *July* 1745. and the livery were prohibited from electing, and had no power to elect him ſheriff; that he was diſabled from, and incapable of being elected; and that the ſuppoſed election of him was void. To this plea, the plaintiff replied, that by the ſtatute of the 5 *Geo.* *c.* 6. *ſect.* 3. it is enacted, that no perſon choſen into ſuch office ſhall be removed or otherwiſe proſecuted, for omiſſion of taking the ſacrament, nor ſhall any incapacity or diſability be incurred by reaſon of the ſame, (unleſs he be removed, or proſecution commenced, within ſix months.) To this replication the defendant demurred; and the plaintiff joined in demurrer. And judgment was given for the plaintiff in the ſheriffs court.

The defendant ſued a writ of error, before the mayor and ſheriffs, in the court of *Huſtings*; and the judgment was there affirmed.

A writ of error of this judgment given in the *Huſtings* was brought before the commiſſioners of *St. Martins le Grand.* The judges named in the commiſſion were the chief baron *Parker*, Mr. juſtice *Foſter*, *Bathurſt*, and *Wilmot.* The plaintiff in the original action pleaded, *in nullo eſt erratum.* The cauſe was argued three ſeveral times by the moſt eminent counſel in the profeſſion. The counſel for the defendant objected to the declaration, becauſe the plaintiff had not ſtated therein, that the city of *London* had any right either by charter or preſcription to elect the defendant ſheriff: and the by-law being made to regulate this franchiſe, it ought to appear on the face of the declaration, that they are intitled to the franchiſe; which can only be by charter or preſcription. But the judges being unanimous in their opinion upon the real merits of this cauſe, declined giving any opinion upon this point, though they all ſeemed to think there was great weight in it.

Mr. juſtice *Foſter* delivered his opinion to the following effect:—I ſhall found my opinion upon the toleration and corporation acts. I ſhall conſider the corporation act, in the light of a prohibition to the electors. It was conſidered in that light in the caſe of the mayor of *Guildford* and *Clarke*. 2 *Vent.* 247, 248. Notwithſtanding there were in that caſe exceptions to the declaration which were ſaid to be fatal, yet it appears by the report, that the court delivered their opinion in this manner,——that the matter pleaded by the defendant was a good bar; that to make a default in the defendant, there muſt have been an election antecedent, and the election of ſuch a one as the defendant is, is abſolutely prohibited by the ſtatute: then I add, that ſince the corporation act is prohibitory to the electors, now they have wilfully after notice choſen the defendant, they have contravened that whole prohibition, and acted contrary to it; and I am of opinion, that the election is a mere nullity.—The preamble to acts of parliament is the great window by which light is let in upon the ſenſe of them. If you conſider the preamble to the corporation act, it will appear beyond a doubt, that the intention of the legiſlature in paſſing the corporation act, was to exclude proteſtant diſſenters of all denominations from corporation offices. The preamble to the act, after making ſhort mention of the late troubles, ſays, "To the end that the ſucceſſion in ſuch corporations may be moſt probably perpetuated in the hands of perſons well affected to his Majeſty and the eſtabliſhed government, it being too well known, that notwithſtanding all his Majeſty's endeavours, and indulgence in pardoning what is paſt, nevertheleſs many evil ſpirits are ſtill working; for prevention of the like miſchief for the time to come, and for preſervation of the publick peace both in church and ſtate, Be it enacted," and ſo on. Theſe were the motives upon which the legiſlature proceeded in making this act. The means they made uſe of to effect theſe ends were two: one regards the perſons who were at that time in corporation offices: the other, thoſe who

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ſhould come into ſuch offices of truſt for the future. The act, in order to accompliſh the great ends for which it was made, is very particular: "No perſon ſhall for ever hereafter be placed or choſen in or to any of the offices or places aforeſaid, who ſhall not have within one year next before ſuch election taken the ſacrament of the Lord's ſupper according to the rights of the church of *England*." And then it goes on, and ſays, that "Every perſon ſo placed or choſen ſhall take the oaths and ſubſcribe the declaration at the ſame time the oath of office is adminiſtred; and in default thereof, every ſuch election is declared to be void." This clauſe, as I take it, conſiſts of two branches, compleat, diſtinct, independent in their own nature. The firſt regards perſons who have a right, and have power in poſſeſſion; the ſecond regards thoſe who ſhould be candidates, and be elected hereafter. The firſt is in my opinion prohibitory upon the electors. It lays a reſtraint upon them, in the exerciſe of their power of electing. It confines them to perſons who conform to what is preſcribed by the act. The words, as I read them, are that no perſon not previouſly qualified ſhall be for ever hereafter elected. What is that but ſaying, that no perſon having power to elect, ſhall elect any perſon not previouſly qualified as the act directs. I cannot make out any difference between the two terms, that the election ſhall be void, and that they ſhall not elect ſuch perſons. —The ſecond branch of this clauſe, regards only the condition of the candidate. It goes upon a ſuppoſition, that a candidate may be eligible, and actually elected into the office; and upon that ſuppoſition, it requires a form to be gone through by him, and in default thereof his election is declared to be void. I do not found my opinion upon this branch of the ſtatute, but upon the other, which (I take it) prohibits the election of a perſon not previouſly qualified.—As to the words in the ſecond branch, "That in default thereof the election ſhall be void," I think that according to true grammar, and the ſtrict meaning of the words, it means plainly this;

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in default of thoſe things being done, which are required to be done by a candidate after his election, and not in default of that which this act no way requires. The corporation act does not require from any perſon who is a candidate for a corporation office, that he ſhall take the ſacrament: he is under another obligation to conform to the eſtabliſhed church. And though I admit that the rubrick did formerly enjoin conformity to the eſtabliſhed church, yet in the conſtruction of the words, "In default thereof the election to be void," we muſt confine ourſelves to thoſe duties which this act alone requires. We muſt do ſo in common grammar and conſtruction. Here is no running into the other branch of the clauſe in order to conſtrue this. If then the act is prohibitory upon the electors, the conſequence will be, that if they having due notice of the incapacity of the candidate, proceed notwithſtanding to the election of a perſon declared by the ſtatute to be not eligible; the whole proceeding will be a mere nullity, in contravention of the prohibition to the electors, wilful, open, and undiſguiſed.—A right of action cannot accrue to the corporation from ſuch an improper proceeding, contrary to the ſtatute, prohibited by the ſtatute, and conſequently null and void from the beginning. Thus it ſtands with regard to the corporation.—As to the defendant: He is now called upon under a penalty, to uſurp an office upon the crown; which uſurpation will ſubject him to a criminal proſecution and all its conſequences. A ſtrange dilemma this: to be obliged to uſurp upon the crown, or forfeit the penalty of the by-law. Can the by-law purge the uſurpation? A by-law cannot purge or excuſe an uſurpation. It would be abſurd then to ſay, it can oblige a man to uſurp.—It has been ſaid, that all corporations have a right to the ſervice of their members. All corporations, under proper limitations, certainly have this right. But ſtill it is a right ſubject to the controul of the legiſlature. And in matters of election, they muſt ſubmit to ſuch regulations as the ſtate ſhall think fit to make.—It

is asked, ſhall perſons who live in open contempt of all government in a ſtate, ſhelter themſelves under this act? That was ſaid in *Larwood*'s caſe; and it has been thrown out in this caſe, not very decently. It is ſufficient at this time to ſay, that the caſe of debauchees and infidels was not in the contemplation of the legiſlature at the time this act was made: Conſequently this act cannot extend to them. This act was plainly levelled at perſons of quite a different character. It was not levelled at atheiſts or infidels, but proteſtant diſſenters, beſides the defendant does not endeavour to ſhelter himſelf under the idle excuſe which the objection puts him to, of being an atheiſt, debauchee, or an infidel. But the defendant, as he pleads the toleration act, avers that he does not live in open diſobedience to the ordinances of the church, although he has taken ſome ſcruples in regard to the mode of adminiſtration in the eſtabliſhed church: he is real and ſincere in his ſcruples, and lives in obedience to the ordinances of the church.—Diſtinction has been made in the argument, between the acts and proceedings being void in themſelves, and only voidable. The anſwer I give to that is, that the point now in queſtion will not turn, nor do I put it upon that branch of the clauſe which declares the election void, but upon that which abſolutely prohibits the election, and conſequently renders it a mere nullity.—It has been ſaid, that the conſtruction now contended for is partial to diſſenters, in excuſing them from offices of burden. I ſay, yes, it is; and it therefore excludes them from all corporation offices which are attended with profit and honour. It would be abſurd to ſay, that the ſame law that exempts them from the one, as perſons unworthy of a public truſt, has ſtill left them liable to the other offices, be the truſt that attends the office what it may. The truſt attending the office of ſheriff of the city of *London* is a high truſt. Therefore if proteſtant diſſenters are excluded from offices attended with profit, merely as perſons not worthy of a public truſt; it would be odd to ſay, that they ſhall be obliged to ſerve the

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office of ſheriff, which is not only an office of honour, but likewiſe an office of very high truſt.—It was ſaid in *Larwood*'s caſe, and I believe it had weight, that no man can by his own plea diſable himſelf, nor excuſe one default by another. It is ſufficient now to ſay, that *Larwood*'s caſe was totally and ſubſtantially different from the preſent. He had not properly pleaded the toleration act, and therefore could take no advantage of it. The preſent defendant has pleaded it properly, and ſhewn himſelf not eligible. The defendant does not plead the toleration act and diſability, to excuſe one offence by another; but to ſhew, that although the rubric did require a conformity in all things, as to receive the ſacrament in the church three times a year, and the like, yet now his complying with the rubric is not to be imputed to him as a crime; that the ſame act which hath taken away the offence, hath taken away the guilt; and that he is guilty of no offence, in not complying with that which does not bind him, that by the toleration act the rubric is taken out of the defendant's way, and doth not extend to his caſe. There are particular branches of the act, from which this intent may be collected; but I am clearly of this opinion, from the whole ſpirit and frame of it. The act of toleration is not to be conſidered merely as an act of connivance and exemption from former laws. It was made, that the public worſhip of the diſſenters might be legal, and that they might be intitled to the public protection. Upon different occaſions in the act, the religious worſhip of the diſſenters is ſpoken of, as a mode of worſhip tolerated by the act. This clearly ſhews, that the mode of worſhip among the diſſenters is legal, and authorized by law. There were former laws obliging perſons to reſort to diſſenting churches, to be attendant on divine ſervice; and diſſenters are now obliged to the ſame in their way of worſhip. Perſons contemptuouſly diſturbing the public worſhip of proteſtant diſſenters, are liable to the ſame penalties with thoſe who diſturb the worſhip in pariſh churches or chapels. As to perſons

perſons acting as preachers in diſſenting congregations, they are exempted from ſerving upon juries, and from public offices, as fully as thoſe of the eſtabliſhed church are by the common law.—Upon the whole, the corporation act being prohibitory upon the electors, every election contrary to it is a mere nullity; and the toleration act having diſpenſed with the conformity of the defendant in this particular, the judgment ought to be reverſed.

Mr. juſtice *Wilmot*: The great queſtion in this cauſe is, Whether the plaintiff in the original action, under all the circumſtances diſcloſed by the pleadings, is intitled to recover this ſum of 600*l.* impoſed upon the defendant, for refuſing to comply with that part of the by-law ſtated in the declaration? which directs, that "every perſon elected into the office of ſheriff, ſhall appear before the lord mayor and aldermen, and become bound in a bond for taking the oath of office on the vigil of St. *Michael*." —I am of opinion, the plaintiff is not intitled to recover in this action, and that the judgments which have been given in this cauſe ought to be reverſed.—Several poſitions have been laid down, by the counſel who argued in this caſe, that are clear and indiſputable: Firſt, It is clear, that of common right a power is inherent in every corporation to call upon their members for the performance of all corporate duties. Secondly, That the execution of corporation offices is one of the duties. Thirdly, That a power of making by-laws is incident to every corporation. Fourthly, That a by-law, impoſing a fine for the refuſal of a corporation office, is good. It is equally clear, that the right every corporation has, of calling upon their members to execute corporation offices, may be abridged by themſelves, or by the general laws of the land. The true queſtion is, Whether the right has not been abridged in the preſent caſe, and what will be the legal conſequences of ſuch abridgement?—The unhappy ſituation the royal family and the nation had been in, before the reſtoration, made the legiſlature willing to guard againſt a relapſe: and therefore they thought it neceſſary

ceſſary to regulate the corporations in an arbitrary way, by removing ſome officers, and placing others in their room who were better affected, and alſo by providing officers for the future. The method they took was, by veſting a power in commiſſioners (as we find in the former part of the act) to turn out whom they pleaſed, and place others in their offices. Of theſe they did not require any ſacramental qualification, becauſe while the extraordinary power ſubſiſted, there was another check or controul; but when that commiſſion expired, they did not then chuſe to reſt upon oaths and declarations, but the fitneſs of men by their antecedent religious habit; and made the having received the ſacrament, according to the rites of the church of *England*, the criterion by which that fitneſs was to be determined. They did not propoſe it as a teſt, to be given after, or at his election; becauſe they thought that the charms of power in poſſeſſion might make ſudden converſions, which might not always be ſincere. The intent of the legiſlature is expreſſed in the ſtrongeſt terms, to effectuate ſuch an intention, "Provided that (after the expiration of the commiſſions) no perſon ſhall, for ever hereafter, be placed, elected, or choſen, in or to any of the offices or places aforeſaid, that ſhall not have, within one year next before, taken the ſacrament;" and ſo on: "and in default hereof, every ſuch election is hereby declared to be void." Now this clauſe is not addreſſed to the party elected, but to the electors. The prohibition is laid moſt clearly upon the perſons who had a right to elect. It is the voice of the legiſlature, commanding them not to elect ſuch perſons. An election, contrary to that prohibition, is a tranſgreſſion; and in this caſe it was a wilful tranſgreſſion, becauſe they had notice that *Evans* was one of thoſe perſons: if wilful, then a moral wrong, which can never lay a foundation for an action in a court of juſtice. Courts of juſtice are to inforce the will of the ſociety. Laws manifeſt that will; and it is the duty of courts of juſtice to carry theſe laws into execution: but they are not to ſuſtain actions for doing what the ſociety has

has forbid. The iujunction not to elect, extinguiſhes the right to elect. The act does not make the office, but the election, void. The election in the preſent caſe is an infraction of the law, and right cannot ſpring out of wrong.—If an act of parliament was, with a clauſe, that all unmarried men ſhould be capable of being elected, this would work a releaſe of the original contract as to ſuch perſons. A valid election is a condition precedent to the right which the corporation has to command, and to the obligation on the members to obey. It has been ſaid, that this act was not made to eaſe diſſenters, but to puniſh them; and that an exemption from burdenſome offices will be an eaſe; that the office of ſheriff being one of thoſe, it will be giving the act an effect which the legiſlature did not intend; that it is more agreeable to the intention of the legiſlature to conſtrue the office void as to the perſon elected, and good as to the corporation, who are puniſhing as for contumacy. This is the ſubſtantial part of the argument. Many caſes have been cited, where acts have been deemed good to a certain degree, and void as to all others; but there never was, and it is impoſſible there ever ſhould be, a caſe, where the word *void* was conſtrued in ſuch a manner, as to make the act void as to a perſon who broke the law, and good as to the perſons who have concurred in breaking it. The only point the legiſlature had in view was, to ſecure the power to perſons who outwardly profeſſed the religion of the ſtate. The puniſhment of nonconformiſts, by excluding them from power, was the conſequence, not the end of the law. We, as judges, ought to expound the law with the ſame ſpirit it was made; and therefore ought not to conſtrue it as a vindictive law, for any purpoſe but its own end. Whether this caſe occurred to the legiſlature, or how they thought it ſhould be determined, does not appear. Different men may make different conjectures; but arbitrary conjectures never ought to be the baſis of judicial determinations. If it had occurred, and they had intended to have made any difference between burdenſome and lucrative offices,

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they would have taken notice of it. The conſtruction now muſt be the ſame: ſuppoſe it had been the office of chamberlain, and the queſtion put to the legiſlature? The anſwer muſt have been, We intend to keep nonconformiſts out of power, and therefore we command corporations not to elect them. They cannot be expoſed to a penalty for not executing an office to which they cannot be elected: the exemption from both makes it equal. As to what is ſaid, that perſons may be qualified for a lucrative, and not for a burdenſome office, I do not ſee how ſuch a caſe can exiſt; for if they are qualified to accept a lucrative office, they are qualified to bear a burdenſome one. It ſhews, that it was only a mockery in them; but it does not prove, that the ſcruples of other diſſenters are imaginary. It would be as unjuſt to judge of the ſcruples of all the diſſenters, by the conduct of ſome, as to judge of the doctrines of the eſtabliſhed church, by the lives of ſome of thoſe who profeſs it. It has been urged, that a man ſhall not be permitted to excuſe himſelf, on account of a diſability occaſioned by his own default; that is an aggravation of his offence, to excuſe one crime by another; and that the toleration act did not mean to exempt diſſenters from relative duties. Inſtances have been mentioned of perſons out of their ſenſes, who are not allowed to diſable themſelves; if ſo, when the incapacity ariſes from natural diſability; *a fortiori* in the caſe of a diſability, ariſing from neglect. Firſt, I deny the rule. In *Skin.* 576, *Fitzherbert* was of a different* opinion. It may ſeem hard, that a man ſhall avoid his own acts for dureſs of men, and not for a viſitation from heaven; but the reaſon is, that the law has directed a mode of inquiry, and the King is to take madmen under his immediate protection, and after office found, to avoid ſuch acts as he thinks proper. 5 *Mod.* 421. Madmen cannot be choſen into corporation offices. In *Eq. Caſ. Abr.* 279, Lord *King* has drawn a rational line between the acts done by an inſane perſon to the prejudice of others, and the acts done by him to the prejudice of himſelf.—*King* and *Larwood*

* This opinion does not appear in *Skinner*.

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is no authority in the preſent caſe, becauſe it is clear, that the toleration act was not pleaded, and it was only the opinion of two judges againſt Sir *Samuel Eyre*. In 4 *Mod.* 274. Lord *Somers* is ſaid to have been of the ſame opinion as Sir *Samuel Eyre*. The fine was only five marks, which ſhews the judges thought it a tender caſe. I obſerve, it was admitted in that caſe, that if a man be diſabled by judgment to bear an office, there he is excuſed, becauſe *judicium redditur in invitum*. Why then ſhall not an act of parliament excuſe, which is the judgment of the whole legiſlature? As to Sir *John Read*'s caſe, which was mentioned, it was an information in the *Exchequer*, 28 *Nov.* 26 *Car.* 2. He was appointed ſheriff of *Hertfordſhire*, was ſworn, and took upon himſelf the execution of the office; a caſe very different from this, for he was capable of the office at the time he was appointed, and had been in poſſeſſion. In the preſent caſe, the defendant was not eligible. Sir *John Read* had alledged a diſability which it was in his power to remove, and which it was his duty to remove: but here the defendant's receiving the ſacrament muſt be precedent, and ſince the toleration act, it is not his duty to receive it.—*Box* and *Wollaſton*, another caſe cited, turned upon the informality in the plaintiff's replication. Had it been determined on the point it is now produced to prove, it would certainly have been mentioned by chief juſtice *Holt* and *Eyre*, as a caſe in favour of their opinions. The caſe in 3 *Lev.* 116. differs as much from the preſent caſe, as between legally and illegally elected. I am therefore clearly of opinion, that the judgment ought to be reverſed.

The other two judges delivered their opinions to the like effect, and the judgment was reverſed. *Burn's Eccleſiaſtical Law* 509.

I do declare that I do believe, that there is not any tranſubſtantiation in the ſacrament of the Lord's Supper, or in the elements of bread and wine, at or after The declaration againſt tranſubſtantiation.

the conſecration thereof, by any perſon whatſoever. Stat. 25 Char. 2. *c.* 2. ſect. 9.

The oath of office.

This particular oath of office, which is ſaid * to be by the antient common law, and contains a conciſe account of the nature and ſeveral branches of the ſheriff's office. The antient oath is ſet down in *Dalt. Sher.* 9.

But there being in the antient oath ſome things which were thought too ſtrict † with reſpect to ſheriffs, inſtead thereof the following oath ſhall now be taken by all high ſheriffs, except the ſheriffs of *Wales*, and of the county palatine of *Cheſter*, viz.

I C. P. *do ſwear, That I will well and truly ſerve the King's Majeſty in the office of ſheriff of the county of* Eſſex, *and promote his Majeſty's profit in all things that belong to my office, as far as I legally can or may. I will truly preſerve the King's rights, and all that belongeth to the crown; I will not aſſent to decreaſe, leſſen, or conceal the King's rights, or the rights of his franchiſes; and whenſoever I ſhall have knowledge that the rights of the crown are concealed or withdrawn, be it in lands, rents, franchiſes, ſuits or ſervices, or in any other matter or thing, I will do my utmoſt to make them be reſtored to the crown again; and if I may not do it myſelf, I will certify and inform the King thereof, or ſome of his judges; I will not reſpite or delay to levy the King's debts for any gift, promiſe, reward, or favour, where I may raiſe the ſame without great grievance to the debtors; I will do right, as well to poor as to rich, in all things belonging to my office; I will do no wrong to any man for any gift, reward, or promiſe, nor for favour or hatred; I will diſturb no man's right, and will truly and faithfully acquit at the exchequer all thoſe of whom I ſhall receive any debts or duties belonging to the crown; I will take nothing whereby the*

* *Dy.* 168. *b. pl.* 19.

† See *Cro. Car.* 26. Several exceptions taken by Lord *Coke* to the additions made to the antient oath, and annexed to the *Dedimus* to ſwear him ſheriff of *Bucks.*

King

King may loſe, or whereby his right may be diſturbed, injured, or delayed; I will truly return and truly ſerve all the King's writs, according to the beſt of my ſkill and knowledge; I will take no bailiffs into my ſervice but ſuch as I will anſwer for, and will cauſe each of them to take ſuch oaths as I do, in what belongeth to their buſineſs and occupation; I will truly ſet and return reaſonable and due iſſues of them that be within my bailiwick, according to their eſtate and circumſtances, and make due panels of perſons able and ſufficient, and not ſuſpected or procured, as appointed by the ſtatutes of this realm; I have not ſold or let to farm, nor contracted for, nor have I granted or promiſed for reward or benefit, nor will I ſell or let to farm, nor contract for, or grant for reward or benefit, by myſelf or any other perſon for, or for my uſe, directly or indirectly, my ſheriffwick or any bailiwick thereof, or any office belonging thereunto, or the profits of the ſame, to any perſon or perſons whatſoever; I will truly and diligently execute the good laws and ſtatutes of this realm, and in all things well and truly behave myſelf in my office, for the honour of the King and the good of the ſubjects, and diſcharge the ſame according to the beſt of my ſkill and power. So help me God. Stat. 3 Geo. c. 15. ſect. 18.

Which ſaid oath is hereby ordered and enacted to be adminiſtred and given by ſuch commiſſioners as ſhall be named and authorized to adminiſter the foregoing oath to the high ſheriff in the country, when and ſo often as a commiſſion or *dedimus* ſhall be ſued forth of the proper court for that purpoſe, or by the barons of the ſaid court, or one of them, when the ſaid ſheriff deſires to be ſworn in town. *Id. ib.*

The ſheriffs of *Wales*, and the county palatine of *Cheſter*, ſhall not be obliged to take the aforeſaid oaths, or either of them, but ſhall ſtill take the uſual and accuſtomed oaths as they have formerly done, except the words following, *viz. Ye ſhall be dwelling in your own proper perſon within your bailiwick, for the time ye ſhall continue in the ſame office, except ye*

be otherwiſe licenſed by the King; which words ſhall hereafter be left out of the ſaid oaths. *Id. ib.*

Return of the *dedimus*.

We have taken the oath of the within mentioned Sir C. P. *knight, ſheriff of* Eſſex, *by virtue of this writ to us directed,* (ſuch a day and year) *truly and faithfully to execute the office of ſheriff, as well according to the form of a certain ſchedule to theſe preſents, as to the tenor of the writ and ſchedule of the writ aforeſaid likewiſe annexed, as that writ orders and directs.*

Entering into a recognizance for payment of his proffers, *&c.*

The new ſheriff muſt go into the remembrancer's office, in the *Exchequer*, to enter the recognizance with ſureties, (or ſome for him) with condition for payment of his proffers or accompts, which is twice in the year, *viz.* at or before *Eaſter* term and *Michaelmas* term. Then his attorney, or ſome other, will write him a note, ſignifying that he is ſheriff of ſuch a county, and hath entered into recognizance; the which note the ſheriff muſt deliver to one of the ſix clerks in *Chancery* to make his patent by, with a writ of aſſiſtance, and a writ of diſcharge to be delivered to his predeceſſors, which ſhould be delivered with all ſpeed to his predeceſſors, for the benefit of his under-ſheriff; becauſe, till it be delivered, the precedent ſheriff may do execution of all proceſs. *Dalt. Sher.* 7.

When and where new ſheriff muſt read his letters patent.

The new ſheriff, at the firſt county court next after his election, and the diſcharge of the old ſheriff, muſt read his patent and writ of aſſiſtance, and nominate his under-ſheriff. *Dalt. Sher.* 19.

Sheriff to have four deputies to make replevins.

"Every ſheriff of ſhires, being no cities nor towns made ſhires, ſhall at his firſt county day, or within two months after he has received his patent, proclaim in the ſhire town four deputies, dwelling not above twelve miles one diſtant from another, which deputies ſhall, in the ſheriff's name, make replevins and deliverance of diſtreſſes, as the ſheriff may do; upon pain that every ſheriff, for every month that he ſhall lack ſuch deputies, ſhall forfeit five pounds, one half to the King, and the other half to him who will ſue." *Stat.* 1 & 2 *Phil. & Mar. c.* 12. *ſ.* 3.

" Every ſheriff ſhall make yearly a deputy in the courts of *Chancery*, *King's Bench*, *Common Pleas*, and *Exchequer*, of record, before he returns any writ, to receive all writs and warrants; and all ſheriffs, bailiffs, gaolers, coroners, or other officers, which do contrary to this ordinance, ſhall loſe to the party grieved his treble damages, and ſhall forfeit forty pounds, whereof the King ſhall have the one half to be employed to the uſe of his houſe, and the party who will ſue, the other half. And the juſtices of aſſize, juſtices of the one bench and of the other, and juſtices of the peace, ſhall have power to inquire, hear and determine of office, without ſpecial commiſſion, of all who do contrary to theſe ordinances." *Stat.* 23 *H.* 6. *c.* 9. *ſ.* 1. Shall appoint deputies in the courts to receive writs.

" Every ſheriff of *Wales*, and of the counties palatine of *Cheſter*, and of the city of *Cheſter*, ſhall have, in the *King's Bench* and *Common Pleas*, one deputy to receive writs; and all writs of proclamation ſhall be delivered to ſuch deputy of record." *Stat.* 1 *Edw.* 6. *c.* 10. *ſ.* 3. *Wales, Cheſter.*

" Every ſheriff of the county palatine of *Lancaſter* ſhall have, in the ſaid courts of *King's Bench* and *Common Pleas*, one deputy at leaſt to receive all writs of proclamation, which ſhall be delivered unto ſuch deputies of record." *Stat.* 5 & 6 *Edw.* 6. *c.* 26. *ſ.* 4. *Lancaſter.*

" Every biſhop of the biſhoprick of *Durham*, and during the vacation the chancellor of the county palatine, ſhall have, in the court of *King's Bench* and common pleas, one deputy at leaſt to receive writs of proclamation, which ſhall be delivered to ſuch deputy of record. *Stat.* 31 *Eliz.* *c.* 9. *ſ.* 3. *Durham.*

Such deputies are to be made by warrant of attorney from the high ſheriff. *Dalt. Sher.* 20. but ſee *id.* 457. Deputies to be made by writing.

The ſuperior courts have inforced the above acts of parliament as far as they relate to the ſheriffs appointing deputies, by obliging them to be entered on record in the reſpective courts. See the following rules in the *King's Bench*, viz. *Mich.* 1654. *Eaſter* 16 *Car.* 2. *Reg.* 4. and in the *Common Pleas*, viz.

Mich. 1654. *Hil.* 15 & 16 *Car.* 2. *Mich.* 1654. *Com. Rep.* 566. *pl.* 243.

Taking over priſoners, &c. by indenture.

The next thing is, the new ſheriff at or before his firſt county court, muſt take over from his predeceſſor all his priſoners and writs preciſely by view, and by indenture to be made between them, wherein all the cauſes which he has againſt every priſoner muſt be ſet forth and delivered, or elſe the new ſheriff is not charged with them. *Dalt. Sher.* 15.

An aſſignment of the priſoners, though not by indenture, ſhall bind the new ſheriff if he has notice of the cauſes wherewith the priſoners are charged; for it ſeems the form of the indenture was introduced only for the conveniency and ſecurity of ſheriffs; and therefore if a note or ſchedule only is made of the priſoners, with the cauſes of their impriſonment, and this delivered to the new ſheriff, and thereupon he accepts the cuſtody of the * gaol, they are as effectually turned over as if done by indenture; *volenti non fit injuria*; and the new ſheriff can no more pretend to ignorance when the truſt he engages in is declared to him by deed poll, than by indenture. 4 *Bac. Abr.* 441, 446. 19 *Vin. Abr.* 454. *pl.* 8. *Supplem. to Lil. Abr.* 37. *pl.* 4. *Barnes's Notes C. P.* 259. † 2 *Kel.* 125. *pl.* 101. *Dalt.* 15. *Sid.* 335. *pl.* 21. 2 *Rol. Rep.* 146. but the new ſheriff may compel the old ſheriff to make an aſſignment by indenture. 2 *Kel.* 125. *pl.* 101.

What ſhall be ſaid a good delivery, and how to be made.

It was the opinion of all the juſtices, that by law the old ſheriff ought to deliver the body of him who is in his cuſtody, by view to the new ſheriff,

* That the new ſheriff is not bound to take delivery of a priſoner but in the common gaol of the county. *Poph.* 85. 2 *Leon.* 54. *Hard.* 30, 33.—A writ for the new ſheriff to compel an aſſignment by indenture from his predeceſſors. *Reg.* 295.

† This is *Rep. and Caſ. in Chanc.* and *K. B.* 4, 5, 6, 7, and *Geo.* 2. but as the author has put his name to the Edit. referred to, *viz.* 1764. and in order to diſtinguiſh it from Lord Ch. Juſt. *Kelynge's Reports* publiſhed by Lord Ch. Juſt. *Holt*, (See *Holt's Life* 115.) we venture to call it 2 *Kel.*

and

and ſuch priſoners ought to be brought to him to view; and from that time the law ſhall judge the priſoners in the poſſeſſion of the new ſheriff, and not before. 2 *Leon.* 54.

Of one kept in a private priſon.

D. ſheriff of *Warwick* had one in execution, whom he kept in a private priſon by himſelf, for all his executions in the town of *Warwick*; and and when he was diſcharged of his office, and a new ſheriff made, *D.* ſaid to the new ſheriff, that he had ſuch an one in execution in his cuſtody, and offered to the ſaid ſheriff to put him in the indenture amongſt his other priſoners delivered to the new ſheriff, but the new ſheriff refuſed to receive him, unleſs *D.* would deliver him into the common gaol of the county, which was in the Town of *Warwick*, and then the priſoner eſcaped. *D.* was charged with this eſcape, for the new ſheriff is not compellable to take the priſoners of the delivery of the old ſheriff, but in the common gaol of the county. And if the ſheriff dies, the party ſhall be rather at a prejudice, than the new ſheriff without cauſe charged with him: and in ſuch a caſe, the party who ſued execution, may help himſelf, (to wit) by a remanding of the body by a *corpus cum cauſâ*, whereby he may be brought to be duly in execution, and this under a due officer. *Mo.* 688.

There was an *Habeas corpus ad recipiend'*, *&c.* for *W. W.* to *H.* ſheriff of *Glouceſter*, and he moved the court for their advice, becauſe *W.* was in execution when *B.* was ſheriff, and was left in the gaol when *C.* was ſheriff; but he was not turned over by indenture to *C.* nor to *H.* but was yet in the gaol, and had been charged with a new execution, which they were ready to return, but pray that he ſhall not be inforced to return the other execution, becauſe he was not in cuſtody to him for this. By the court, he ſhall not be compelled to make other return, but for the firſt execution he ſhall yet remain in the cuſtody of *B.* the ancient ſheriff, though his body be in the cuſtody of the new, becauſe he was not turned over by indenture;

and the difference between this and *Westbie's* case, is, that there the prisoner was turned over for one debt, and not for the other; and therefore an escape for that. And *by the court*, *B.* the ancient sheriff may turn him over by indenture to *H.* the present sheriff (for it ought not to be to *C.* for he never was in his custody), and then he will make return of all the executions. *Sid.* 335. 2 *Keb. Rep.* 224.

It must be by *B.* to *H.* and not by *B.* to *C.* &c.

If the sheriff takes a man in execution, and afterwards a new sheriff is made, and afterwards, and before the antient sheriff delivers this prisoner over by indenture to the new sheriff, the prisoner escapes, here the old sheriff only is chargeable for this escape, and not the new sheriff; for the new sheriff shall be chargeable for no other prisoners than what are delivered over to him by indenture. *Cro. Eliz.* 365, 366. *Hob.* 266. *Bulstr.* 70. 2 *Leon.* 54. 3 *Co.* 72. 2 *Rol. Abr.* 457.

For what prisoners the new sheriff shall be chargeable.

Where the new sheriff is chargeable upon an arrest by the old sheriff's return of *Languidus*, the party remaining always in prison. *Cro. Jac.* 380.

Upon the old sheriff's former return.

And in *Cro. Eliz.* 440. action on the case was brought against the sheriff; and the plaintiff declared, whereas he had recovered 100 *l.* and had a *Fieri Facias*, and the defendant by virtue thereof levied 28 *l.* and had not returned the writ, nor paid the money to the plaintiff. On not guilty pleaded, in evidence it was proved, that the writ was delivered to *C.* the defendant's under-sheriff, 9 *Nov.* 34 *Eliz.* and the same day he made execution; and he proved, that the same day a writ of discharge was delivered to him. But he did not prove he had notice of this writ of discharge, before the execution served. *By the Court*, He was yet sheriff, and chargeable to the plaintiff's action. The ancient sheriffs ought to give notice of all executions against any in their custody, to the new sheriff, although the executions are of record; or otherwise the new sheriff shall be chargeable with them. But if the old sheriff die, the new sheriff at his peril shall take notice of all executions which are against any that he finds in the

Execution executed the same day that the writ of discharge came.

Notice of executions to the new sheriff.

the gaol; and this is of neceſſity, for there is none to deliver over the priſoners to him: and in ſuch caſe the new ſheriff is to take notice of all the writs. *Moor* 688. *Poph.* 85. 3 *Co.* 71. *Cro. Eliz.* 366.

Executions to be mentioned in the indenture.

The delivery over of the priſoners muſt be by indenture, and every ſeveral execution againſt every of them muſt be therein mentioned, and therefore in the great caſe to this purpoſe, *viz. Weſtbie*'s caſe, The ſheriffs of *London* by indenture deliver over *J. S.* (who was in execution at the ſuit of *A.* and *B.* ſeverally) and only mentions the execution of *A.* and *J. S.* eſcapes; *B.* brought debt againſt the old ſheriffs, and adjudged that the action well lies; for he cannot be in cuſtody of the new ſheriff for this execution, becauſe they were not charged with this execution, and the fault was in the old ſheriffs, in omitting it on their indenture, and the eſcape commences *eo inſtante*, that the ancient ſheriffs deliver their priſoner to the new, for then they * ceaſe to have the cuſtody of him; and though he remains in the walls of the gates, it is an eſcape in law. 3 *Co.* 71. *Cro. Eliz.* 265. 2 *Rol. Abr.* 457. *Hob.* 266. *Bulſtr.* 70. 2 *Leon.* 54.

And until the priſoners are delivered to the new ſheriff, they remain in the cuſtody of the old ſheriff, notwithſtanding the new patent, the writ of diſcharge, and the writ of delivery. *Wood's Inſt. b.* 1. *ch.* 7. *p.* 70.

Writs to be turned over to the ſucceeding ſheriff.

"All ſheriffs ſhall at the expiration of their office turn over to the ſucceeding ſheriff, by indenture and ſchedule, all ſuch writs and proceſs as remain in their hands unexecuted, who ſhall execute and return the ſame: and in caſe any ſheriff neglect to turn over ſuch proceſs, he ſhall be liable to make

* And the new ſheriff is to be charged with an eſcape after. *Cro. Jac.* 380. But if a priſoner is omitted out of the indentures, and ſo not turned over at all, he remains in the cuſtody of the old ſheriff. *Sid.* 335. *Noy* 51. 2 *Leon.* 54. 2 *Keb. Rep.* 224.

ſatisfaction by damages and coſts to the party aggrieved." *Stat.* 20 *Geo.* 2. *c.* 37.

Not to return writs ſix months after expiration of his office.

"No ſheriff ſhall be called upon to make a return of any writ or proceſs, unleſs he be required ſo to do within ſix months after the expiration of his office." *Ib. Sect.* 2.

All the writs which are ſet over in the indenture between the ſheriffs, if they have been executed by the old ſheriff, then they muſt be returned by him, or in his name, and ſubſcribed by the new ſheriff, thus:

Dalt. Sher. 18. *This writ as indorſed was delivered to me by Sir* J. S. *knight, the late ſheriff my predeceſſor, at the going out of his office.*

By Sir *C. P.* knight, ſheriff.

Till what time the old ſheriff, or the new ſheriff may act.

The old ſheriff of a county is ſheriff until the the new one be ſworn, although he be choſen; for it is the taking of his oath that doth compleat him in his office; and before he is ſo compleated, the old ſheriff is in office, for there muſt not be a vacancy, leſt there be a failure of juſtice for want of a ſheriff. 2 *Lil. Abr.* 632, 633. And the arreſt is good by the old ſheriff till a new patent be ſhewed to him, or other ſufficient notice. *Cro. Eliz.* 12. The acts of the old ſheriff are good, till a writ of diſcharge received. *Moor* 186. And a bailiff errant may execute a warrant of an old ſheriff made before a writ of diſcharge, although a new ſheriff be choſen. *Moor* 364.

In what caſe proceſs ſhall be to the old ſheriff.

Generally the ſheriff who begins an execution ſhall finiſh it, though his office is expired; therefore proceſs, in ſome caſes, may be to the old ſheriff, to bring in the body of a priſoner; and that is, where before he hath made a return of *Cepi Corpus & parat' habeo*, and afterwards he is removed, and a new ſheriff made; on nonappearance of the priſoner,

ſoner, proceſs ſhall go to the old ſheriff by * *Diſtringas*. *Bulſtr.* 82.

The difference is, if the ſheriff at the day return *Cepi corpus*, and have not the body ready, he ſhall be amerced, and a *Diſtringas* ſhall be awarded to the coroners. But if the old ſheriff at the day return *Cepi corpus*, and before the day of the return is removed, and a new one is made, the *Diſtringas* here ſhall be awarded to the new ſheriff, if it appear on the record that he has taken the body.

Upon a *Cepi corpus.*

Diſtringas.

A ſheriff on a *Fieri facias* ſeiſed goods in his hands to the value of the debt, and paid part of the debt; and the goods not being ſold, nor the writ returned, the ſheriff was diſcharged, and afterwards ſold the reſidue of the goods without any *Venditioni exponas*; and *by the court*, the ſale is good; for the writ of *Fieri facias* gave authority to him to ſell without any other writ. *Cro. Jac.* 73. *Mo.* 557. *Rol. Abr.* 893, 894. But *Yelv.* S. C. ſays it was adjudged *contra*, but ſeems to be a miſtake. 4 *Bac. Abr.* 446. but ſee *Barnard. K. B.* 81.

Sale of goods after diſcharge.

The ſheriff ſold goods upon a *Fieri facias*, and upon a *Venditioni exponas*, he returned *that he could not find buyers*, then his office determined, and he ſtill detained the goods in his hands; and it was ſaid, the plaintiff had no other remedy againſt the old ſheriff, but to have iſſues upon him. *Latch* 117.

New ſheriff no remedy, but by iſſues.

If money be paid to the old ſheriff, and he is diſcharged before the return of the writ, the party ſhall not be compelled to pay it again; and the plaintiff may have his remedy againſt the antient ſheriff, if he will. *Cro. Eliz.* 208, 209. *pl.* 4. *Sav.* 123. *pl.* 192. *Ander.* 247. *pl.* 260.

Where party paid the money to the old ſheriff.

* There are two ſorts of *Diſtringas*, one to diſtrain the old ſheriff to ſell, and bring in the money, the other to ſell, and deliver the money to the new ſheriff, to bring it into court; which plainly ſhews his authority continues by virtue of the firſt writ. *Salk.* 323. 2 Ld. *Raym.* 1074, 1075. 11 *Mod.* 34, 35. The *Diſtringas* which commands the new ſheriff to diſtrain the old one to ſell, and bring in the money, is the moſt uſual. 6 *Mod.* 299.

The

Proclamation returned by him.

The old ſheriff returned the proclamation upon an *Exigent*; after that he was diſcharged of his office, and by the judgment of the *court* the outlawry was void, and the party was diſcharged. *Dy.* 41.

Old ſheriff not to be fined for a former contempt.

The juſtices ſaid they could not grant an attachment againſt a ſheriff for a contempt, after he was removed out of his office, for then he was no officer, and could not be fined, and without fine they do not uſe to impriſon. 2 *Brownl.* 144.

A tipſtaff to be ſent for.

A ſheriff out of his office cannot be fined by the court, but a tipſtaff may be ſent for, to bring him in to anſwer the miſdemeanor committed by him when he was in his office. 2 *Lil. Abr.* 627. or a *Diſtringas nuper Vicecomiti* may iſſue out againſt him. 2 *Saund.* 88. 2 *Lil. Abr.* 627.

Attachment for frivolous return of an *Hab. Corp.*

Attachment againſt ſheriff for frivolous return of *Hab. Corp.* which was that the committee for poor priſoners ordered he ſhould not bring the body, till they had conſulted with the lord chief juſtice; and an *Alias Hab. Corp.* under pain of 80 *l.* *Styl. Rep.* 422.

For not bringing money into court on an exemption.

An attachment was granted againſt a ſheriff, for refuſing to bring monies into court which he had levied upon an execution, and was ordered by the court to bring it in, for the ſheriff is an officer of the court. *Lil. Abr.* 159, 160.

For not returning a *Venditioni exponas.*

An attachment was granted againſt the ſheriff of *C.* for that he returned he had taken goods upon a *Teſtatum Fieri facias*, but that they remained in his hands for want of buyers; whereupon a writ iſſued to put them to ſale, of which he made no return, nor any ſatisfaction to the plaintiff. *T. Raym.* 171. *Lil. Abr.* 160.

Determination of his office.

The King may determine his office when he pleaſeth, though he cannot (during the continuance of his office) abridge his power. 4 *Bac. Abr.* 431.

The ſheriff being made a baron of parliament, or becoming a baron by deſcent, this doth not determine his office. *Cro. Eliz.* 2. *pl.* 3.

By the common law the patents of ſheriffs, like all other commiſſions determined by the death of the King. *Dy.* 165. 2 *Sid.* 49. *Dalt. Sher.* 17. But now by the ſtatutes 7 & 8 *W.* 3. *c.* 27. *ſect.* 21.

1 *Ann.*

1 *Ann. ſt.* 1. *c.* 8. *ſect.* 2. ſuch commiſſion ſhall remain in full force for the ſpace of ſix months next after ſuch death or demiſe, unleſs ſuperſeded, determined or made void by the next ſucceſſor. 4 *Bac. Abr.* 435.

But though ſuch patent was determined by the death of the King, yet it was adjudged, that if the ſheriff after ſuch demiſe, and before his taking out a new patent, ſuffered a priſoner to eſcape, that an action lay againſt him. 7 *Co.* 30.

On death of ſheriff under-ſheriff to continue.

"If any ſheriff ſhall die before the expiration of his year, or before he be ſuperſeded, the under-ſheriff ſhall nevertheleſs continue in his office, and execute the ſame in the name of the deceaſed, till another ſheriff be appointed and ſworn; and the under-ſheriff ſhall be anſwerable for the execution of the office during ſuch interval as the high-ſheriff would have been; and the ſecurity given by the under-ſheriff and his pledges ſhall ſtand a ſecurity to the King and all perſons whatſoever, for the due performing of his office during ſuch interval." *Stat.* 3 *Geo. c.* 15. *ſect.* 8.

Death of ſheriff of *London*.

Twenty-ſeventh of *February* 1723, ſeven or eight judges met at the requeſt of chief juſtice *Pratt*, concerning the death of one of the ſheriffs of *London*, Sir *Felix Feaſt*, which happened juſt before the ſeſſions at the *Old Baily*; and the judges not agreeing whether the under-ſheriff could go on by the above act, and it being a difficult queſtion, chief juſtice *Pratt* moved to have the ſeſſions adjourned, which was ſo, till another ſheriff was choſen.

The lord chancellor in the caſe above ſeemed to think that one ſheriff might act in the caſe of the death of the other, as the chief clerk in the King's Bench, where a grant was to *Ventris* and *Holt* jointly; *Holt* died, yet *Ventris* did execute alone. *Forteſc. Rep.* 388.

Action againſt ſheriff for quaſhing an eſſoin.

If the ſheriff in his court quaſh an *Eſſoin* erroneouſly, without the conſent of the ſuitors; action on the caſe lies againſt him, for the party cannot have his falſe judgment on this.

If

If a *Diſtringas* iſſues to the ſheriff to diſtrain the defendant in the action by all his lands and chattels, &c. and the ſheriff returns *Trop petit Iſſues* (too ſmall iſſues): although an averment lies by the ſtat. of *W.* 2. *c.* 43. yet the plaintiff may well have his action on the caſe againſt the ſheriff, becauſe it appeareth by the words of the ſtatute that this is a falſe return, and the words are, *Quod Diſtrinxerit*, by all his lands and chattels, *Ita quod de exitibus eorum, &c.* ſo that if he does not return all the iſſues, he does not as he is commanded; the ſtatute ordains, that the King ſhall have the iſſues but reſtrains not any remedy that the plaintiff had at common law. 12 *Mod.* 494. 2 *Inſt.* 449.

Returns *Trop petit Iſſues.*

If the ſheriff imbezil an *Exigent* delivered to him at my ſuit, action on the caſe lies *Tam pro Dom' Rege quam pro meipſo.*

For imbeziling an exigent.

So it lies againſt a ſheriff, though the ſheriff delivered the writ to one of the coroners, and he was robbed thereof by another of them who was named in the *Exigent*, if he was before in the cuſtody of the ſheriff, and he ſuffered him to go at large, for this was his own folly. A knight for the county brought action againſt the ſheriff for not levying 10 *l.* 4 *s.* for his expences in attendance in parliament.

Though he delivered to one of the coroners.

For not levying expences in parliament.

The ſheriff was puniſhed in the *Star Chamber*, for neglecting to execute a *Capias Utlagat'* after judgment. *Hob.* 244.

Action on the caſe lies againſt a ſheriff, for entring a corporation which had *Retorna Brevium. Rol. Rep.* 118, 119.

For entring into a corporation which had *Retorna Brevium.*

J. S. recovered a debt againſt *Calthrop*, and procured a writ of execution to *W. P.* ſheriff of *D.* but before the writ was executed, *Calthrop* procured a *Superſedeas* to the ſaid *P.* who when his time was out, delivered all the writs to the new ſheriff, but not this *Superſedeas*; ſo that *J. S.* procures a new writ of execution to the new ſheriff, upon which eight of *Calthrop*'s beaſts were taken. And he brings his action againſt *P.* for not delivering over the *Superſedeas.* By the prothonotaries, the courſe

For not delivering a *Superſedeas* to the new ſheriff.

is

is to take a new writ to the new ſheriff. But the court inclined that the action lay; for the writ to the old ſheriff is, *Quod comitat' præd' una cum brevibus rotulis memorandis & omnibus officium illud tangen'*. And an action will lie for not delivering ſome writs to the new ſheriff, which are not returned, *&c.* as eſtrepment. *Mod. Rep.* 222.

If a ſheriff or a mayor refuſe ſufficient bail againſt the ſtatute of 23 *H.* 6. *c.* 10. by which the penalty of 40 *l.* is given, one moiety to the King, and the other moiety to the party who will ſue for it. In this caſe no action lies by bill in the *King's Bench* againſt the ſheriff, *&c.* becauſe the ſtatute of 18 *Eliz.* is, *That no perſon ſhall ſue any penal ſtatute but by information or original action, and not otherwiſe.*

For refuſing ſufficient bail.

By information or original.

But note, it is not limited by the ſtatute of 23 *H.* 6. *c.* 10. how the penalty ſhall be recovered, but generally that he ſhall forfeit 40 *l.* one moiety to the King, and the other to him that ſues. 3 *Inſt.* 194. 6 *Co.* 17. *Rol. Abr.* 537.

Though not limited by the ſtatute.

Action on the caſe doth not lie againſt a ſheriff, for ſuffering a priſoner to go at large, upon the taking inſufficient bail. Taking inſufficient ſecurity upon the ſtat. of 23 *H.* 6. it was adjudged, that the death of one of the ſheriffs did not abate the writ. 2 *Saund.* 5. *Hut.* 120. *Keb. Rep.* 56. *pl.* 18. 2 *Inſt.* 340. *Cro. El.* 446.

For taking inſufficient bail.

Death of one of the ſheriffs.

Action on the caſe lies againſt the ſheriff, for that he levied ſuch a ſum of money on a *Fieri fac'* at the ſuit of the plaintiff, and brought not the money into the court at the day of the return.

Action of the caſe againſt the ſheriff for not bringing money levied into court.

The defendant pleaded the ſtat. of limitations 21 *Jac.* it is ill. An *Indebitatus Aſſumpſit* would lie againſt the ſheriff in this caſe, or againſt his executors, and then the ſtatute might be pleaded. If the *Fieri fac'* had been returned, the action would have been grounded upon the record, and it is the ſheriff's fault that the writ is not returned: but however, *per Cur'*, the judgment in this court is the foundation of the action. And ſo judgment *pro Quer.* that it is not within the ſtatute of limitations.

tions. *Mod. Rep.* 24. *Cro. Eliz.* 877. *Cro. Jac.* 360.

Sheriff often in defendant's company.

If the ſheriff is often in the defendant's company, yet returns *Non eſt inventus*, &c. action lies. *Noy* 22. *Cro. Jac.* 532. adjudged and affirmed upon writ of error.

Not ſay, *Tam pro Rege*, &c.

So debt lies, without ſaying *Tam pro domino rege*, &c. *Cro. Jac.* 619, 620. for he may bring his action for what he has loſt, and the precedents have been certified both ways.

Not executing an attachment.

If a miniſter of juſtice hath a warrant to attach the goods of another, and he can do it; and does it not, an action lies againſt him. 3 *Bulſt.* 212. ſee *Mo.* 432.

Party ſhewn to ſheriff.

So if I ſhew *J. S.* to the ſheriff, and give him a writ to arreſt him, and he does not. *Cro. Eliz.* 873.

Neglecting to extend goods upon a *Capias Utlagat'*.

But if upon a *Capias Utlagatum* before judgment, the ſheriff neglects to extend or ſeize goods, &c. this is the King's loſs, and the party ſhall have no action, though it was objected, the ſheriff extending, &c. would have been a means to force the defendant to appear; but it was ſaid, that if it had been ſhewn that the ſheriff might have taken his body, &c. there would have been more reaſon to ſupport the action, &c. 2 *Vent.* 90.

Writ *De Coronatore.*

If upon a writ *De Coronatore Eligend'* the ſheriff will not return him coroner that is choſen by the major part, an action lies. 2 *Vent.* 26.

Debt againſt ſheriff for reward given, on conviction of clippers and coiners.

In debt againſt ſheriff of *Bucks*, for the reward given by the ſtatute 6 & 7 *W. & M.* to thoſe that ſhould diſcover and convict clippers and coiners. Note; here plaintiff had a certificate from my lord chief juſtice *Holt*, who tried the malefactor, of his having been convicted on the plaintiff's evidence; which being produced though under my lord's hand, yet it was proved by my lord's clerk to the jury. And here *Holt* held the demand of this debt of ſheriff, after the certificate, did attach the debt upon him; and that the money was to be paid out of the profits of the county, or upon failure thereof, out of exchequer; and that in ſuch caſe the action would lie

lie againſt the ſheriff's executors, becauſe given by act of parliament, and attached in teſtator; but for the penalty given by the act againſt the ſheriff for default of payment, that ſhould not affect the executor; and that if the ſheriff paid the debt and died, it ſhould be allowed to his executors. 12 *Mod.* 310.

Action will lie againſt ſheriff for not returning good iſſues.

Holt chief juſtice ſaid, that an action would lie againſt the ſheriff for not returning good iſſues upon a *diſtringas*. 12 *Mod.* 494.

If ſheriff refuſes a writ, action lies.

If the ſheriff refuſe a writ, an action will lie againſt him, becauſe the law charges him with an employment for the conveniency and good of the publick. 12 *Mod.* 485.

Neglect or fraud.

Upon every default in the execution of his office, be it by neglect or fraud of the under-ſheriff, he ſhall anſwer and be amerced in the *Exchequer*; but the ſheriff ſhall not be impriſoned for the act of the under-ſheriff, nor be indicted. *Latch* 181. *Dalt. Sher.* 3.

Sheriff amerced for the faults of his ſpecial bailiffs. *Lil. Abr.* 83.

The ſheriff is to be amerced for the faults of his ſpecial bailiffs, for the ſheriff is the officer to the court, and not they; but if the ſheriff return *quod mandavi ballivo, &c. qui reſpondit, &c.* if the return is ſufficient, and a default is for not doing according to the return, the bailiff ſhall be amerced, and not the ſheriff. As if the ſheriff return *quod mandavi ballivo libertatis, &c. qui reſpondit quod cepit J. S.* according to the writ, and he ſhall be here at the day; if he bring him not at the day, the bailiff ſhall be amerced, and not the ſheriff. But if the chamberlain of the county palatine of *Cheſter* makes an inſufficient return to the court of common pleas, upon a writ iſſued out of that court, the ſheriff ſhall be amerced, becauſe he is the officer reſponſible to the court. If the ſheriff return *quod mandavit ballivo libertatis qui ſic reſpondit*, and return an inſufficient return in law, the ſheriff ſhall be amerced, for he might have returned, *ballivus nullum reſponſum* dedit. If the ſheriff return, *feci retornum iſtius brevis* G. & D. *ballivis libertatis* G. *qui habent retornum brevium & executionem eorundem, qui mihi reſponderunt, quod iſtud*

Where the bailiff ſhall be amerced, and not the ſheriff.

Amerced for the inſufficient return of the bailiff of a liberty.

iſtud mandatum adeo tarde receperunt per manus attornat' ſequentis quod nihil inde facere potuerunt; the ſheriff ſhall be amerced for his return, for he ought to have returned it to the bailiff time enough for them to ſerve it. *Brownl.* 36.

Where bailiff of a liberty made no return.

If no return be made for part by a bailiff of a liberty, the ſheriff ſhall be amerced. As in a *præcipe quod reddat*, if at the grand *cape* the ſheriff return *quod mandavit* J. bailiff of a franchiſe, *&c.* who returned, that he had taken the land into the King's hand, and ſpeaks nothing that he hath ſummoned the tenant as the writ commands him; the ſheriff in this caſe ſhall be amerced, for that no return is made in part. 4 *H.* 6. 25. *b.*

Increaſe of amerciaments.

If the ſheriff be amerced by the court, for the not doing a thing belonging to his office, and yet he continues to neglect to do it, contrary to the rule of the court, the court may increaſe his amerciaments till he do his duty therein.

Amerciaments eſtreated with a *reſpectuat.'*

But amerciaments ſet upon the ſheriff upon the motion of the party, if they be not eſtreated into the *Exchequer*, may be with a *reſpectuat'* (that is be reſpited), if the party grieved who cauſed him to be amerced, will conſent thereunto, otherwiſe not. *Lil. Abr.* 83.

Amerciament for not return.

If upon a *latitat*, the ſheriff do return a *cepi corpus*, and the party arreſted on this proceſs doth not appear at the day of the return, the ſheriff may be amerced by the court; yet though the ſheriff be amerced, if the party arreſted do appear within a week after the day he ought to have appeared, the amerciament may be taken off the ſheriff. *Lil. Abr.* 83.

For not returning *fi. fa.'*

If a debt be levied by *fieri facias*, and delivered to the plaintiff, and the writ is not returned, yet the execution and ſale is good; but the ſheriff ſhall be amerced for the *non-return* of the writ. *Compl. Sher.* 417.

Not for returning too ſmall iſſues.

It was moved to have the ſheriff amerced for returning too ſmall iſſues. *Coke* ſaid we cannot do ſo, for (ſaith he) it doth not lie in our own conuſance, whether they are two ſmall or not, but you are put to your action. *Rol. Rep.* 336. See *chap.* . Execution. *Chap.* . Return.

CHAP. II.

Under-Sheriff.

IT is ſaid an *under-ſheriff* is a perſon the * law takes notice of, and that he hath been in uſe before the conqueſt. *Brownl.* 64. But the *under-ſheriff* hath not, nor ought to have any eſtate or intereſt in the office itſelf. *Latch* 187. *Dalt. Sher.* 3. Under-ſheriff, his antiquity.

In antient time this officer was called the ſheriff's ſteward; and in ſtat. *Weſtm.* 2. *c.* 39. (made *anno* 13 *Ed.* 1.) he is called under-ſheriff; and in ſtat. 11. *Hen.* 7. *c.* 15. he is called *The ſhire-clerk*, 9 *Co.* 49. or, *The clerk of the county*, *Dy.* 355. And yet the word *ſhire-clerk* is ſometimes taken to be the under-ſheriff, and ſometimes it is uſed for a clerk in the county court, † deputy to the under-ſheriff. *Dalt. Sher.* 3, 455, 456. His appellations in antient times.

Now an under-ſheriff being in effect but the ſheriff's deputy, according to the nature of a deputation, he is removable as an attorney is; and if the ſheriff makes him irrevocable, yet he may revoke him. He is but in the nature of a general bailiff errant to the ſheriff, and the whole ſhire, as others are over the hundred: ſo that the high ſheriff may grant this office at will. *Dalt. Sher.* 456. *Hob.* 13. The nature of an under-ſheriff.

We have ſeen before, how that an earl had the juriſdiction of the counties, and their commiſſion ran thus: *We have committed the cuſtody of our county to you at will, or for life.* And the ſheriff comes in his place. And all ſheriffs likewiſe have their commiſſions at will; and though there is no mention in his Deputy.

* *Godb.* 389. *arg.* ſays, the law takes no notice of the under-ſheriff.

† The court declared, that in order to put a ſtop to the practice of under-ſheriffs making deputies, they would grant an attachment againſt any one who ſhould do it for the future. 2 *Barnes* 187. *Pract. Reg. C. P. Rep. & Caſ. Pract. B. R.*

patent of any deputy to be made by him, yet he makes one. And as in the firſt government the earl made his deputy, ſo the ſheriff made his deputy, *viz.* the under ſheriff and bailiffs errants within the county, called the *Serjeants of the county*; and there is no warrant for him ſo to do, though yet the ſame hath been always done. 3 *Bulſtr.* 77, 78.

Miniſterial officers may make deputies.

A miniſterial officer, as the ſheriff is, may make a deputy *; but a judicial officer cannot, becauſe he is to do juſtice.

All returns made by him ought to be made in the name of the principal † officer; for the high ſheriff only is to anſwer all. But where the high-ſheriff is made a judge of the cauſe, it is ſaid he cannot make a deputy. *Dalt. Sher.* 3. *Hob.* 13.

Muſt take the oath of office.

All under-ſheriffs of any counties in *South Britain*, except the counties in *Wales*, and county palatine of *Cheſter*, before they enter on their offices, ſhall, before ſuch commiſſioners as ſhall be named to adminiſter the high-ſheriff's oath, [ſee p. 34.] as often as a commiſſion of *dedimus* ſhall be ſued forth for that purpoſe, or before the barons of the *Exchequer*, or one of them, when the under-ſheriff deſires to be ſworn in town, take the following oath: Stat. 3 *Geo. c.* 15. *ſ.* 19.

I A. B. do ſwear, that I will well and truly ſerve the King's Majeſty in the office of under-ſheriff of the

* The high-ſheriff, who need not make an under ſheriff, (*Wood's Inſt.* 74.) if he will, may make his bailiffs and precepts to them; yet if he make an under-ſheriff, of neceſſary conſequence he gives him power to make bailiffs and precepts, without acquainting him therewith: and this he can do by virtue of his deputation; by *Holt* ch. juſt. in delivering the opinion of the court. 12 *Mod.* 468.

† The deputy ſheriff muſt act in the name of his principal, becauſe the writ is directed to the high-ſheriff, and the under-ſheriff acts under the authority and command of the writ, and therefore muſt act in the name of him to whom the writ is directed; by *Holt* ch. juſt. in delivering the opinion of the court, Lord *Raym.* 659. 12 *Mod.* 468. *Salk.* 96.

county

county of , *and promote his Majeſty's profit in all things that belong to the ſaid office, as far as I legally can or may; I will preſerve the King's rights, and all that belongeth to the crown; I will not aſſent to decreaſe, leſſen, or conceal the King's rights, or the rights of his franchiſes; and whereſoever I ſhall have knowledge, that the rights of the crown are concealed or withdrawn, be it in lands, rents, franchiſes, ſuits or ſervices, or in any other matter or thing, I will do my utmoſt to make them be reſtored to the crown again; and if I may not do it of myſelf, I will certify and inform ſome of his Majeſty's judges thereof; I will not reſpite or delay to levy the King's debts for any gift, promiſe, reward, or favour, where I may raiſe the ſame without great grievance to the debtors; I will do right as well to poor as to rich, in all things belonging to my office; I will do no wrong to any man for any gift, reward or promiſe, nor for favour or hatred; I will diſturb no man's right, and will truly and faithfully acquit at the Exchequer all thoſe of whom I ſhall receive any debts, duties, or ſums of money belonging to the crown; I will take nothing whereby the King may loſe, or whereby his right may be diſturbed, injured, or delayed; I will truly return and truly ſerve all the King's writs, to the beſt of my ſkill and knowledge; I will truly ſet and return reaſonable and due iſſues of them that be within my bailiwick, according to their eſtates and circumſtances, and make due panels of perſons able and ſufficient, and not ſuſpected, or procured, as is appointed by the ſtatutes of this realm; I have not bought, purchaſed, or taken to farm, or contracted for, nor have I promiſed, or given any conſideration, nor will I buy, purchaſe or take to farm, or contract for, promiſe, or give any conſideration whatever, by myſelf or any other perſon for me, or for my uſe, directly or indirectly, to any perſon or perſons whatſoever, for the office of under-ſheriff of the county of which I am now to enter upon and enjoy, nor for the profits of the ſame, nor for any bailiwick thereof, or any other place or office belonging thereunto; I have not ſold nor contracted for, or let to farm, nor have I granted or promiſed, for reward or benefit, by myſelf or any other perſon for*

me, or for my uſe, directly or indirectly, any bailiwick thereof, or any other place or office belonging thereunto; I will truly and diligently execute the good laws and ſtatutes of this realm, and in all things well and truly behave myſelf in my ſaid office, for his Majeſty's advantage, and for the good of his ſubjects, and diſcharge my whole duty to the beſt of my ſkill and power.

So help me God.

Muſt take the oaths of allegiance, ſupremacy, and abjuration, receive the ſacrament, and ſubſcribe the declaration againſt tranſubſtantiation.

He muſt alſo take the oaths of allegiance, *Dalt. Sher.* 454. of ſupremacy, *id.* 453, and of abjuration, receive the ſacrament, and ſubſcribe the declaration againſt tranſubſtantiation. See *chap.* 1. *p.* 19.

No under-ſheriff ſhall intermeddle with his office before he has taken the ſaid oaths as aforeſaid, (before the perſons appointed by this act to adminiſter the ſame) or before the head officer of the place, if it be a town corporate, altering only the terms of the office, and the office of under-ſheriff, to ſuch words as are convenient for the deputation, office, or place reſpectively; and this on pain to forfeit 40*l.* between the Queen and the proſecutor. Stat. 27 *El. c.* 12.

Forfeitures, how to be recovered.

The forfeitures may be ſued by debt, bill, plaint, or information, in any of the Queen's courts of record; and juſtices of aſſize, and of the peace, in their open ſeſſions, ſhall hear and determine the default done contrary to this act, and on conviction to award execution by *fieri facias*, *attachm'*, *capias*, or *exigent*. *Id.*

To continue but a year in his office.

"No under-ſheriff ſhall abide in his office above one year." Stat. 42 *Edw.* 3. *c.* 9. confirmed by ſtat. 23 *Hen.* 6. *c.* 7.

This ſtatute is often times evaded.

Yet the ſame perſons often continue to exerciſe the office in other men's names for many years together. *Wood's Inſt.* 74.

Action for exerciſing under-ſheriff's office, *contra* 23 *H.* 6. *c.* 8.

Upon an action in debt againſt one for exerciſing the office of under-ſheriff for two years together, *contra ſtatut.* 23 *H.* 6. *c.* 7. the defendant pleaded his privilege in abatement, as an attorney of the *common pleas*, to be ſued by bill, and the plaintiff *qui tam*, &c. demurred to the plea, and judgment that the writ ſhould abate. *Lut.* 195, &c.

The

The reporter alſo obſerves, that perſons inheritable to the office of ſheriff, at the time of making that act, and alſo ſuch perſons who had freehold in the ſheriff's office at the time of making ſuch act, and their under-ſheriffs and clerks, are excepted out of the ſaid act; and in the declaration it is averred, that the defendant never had any eſtate of freehold, or any other eſtate in the ſaid office; which he ſays is to no purpoſe, for the exception as to the matter extends only to the office of ſheriff, and not to the office of under-ſheriff: for if the ſheriff himſelf had freehold in his office, the under-ſheriff is excepted as his inferior officer. But he makes a *quære* if there need be any ſuch averment, for it cannot be eaſily preſumed to be the eſtate of freehold, which was in being at the time of making that act; 23 *H.* 6. has continuance to this day.

On death of ſheriff, under-ſheriff to continue.

" If any ſheriff ſhall die before the expiration of his year, or before he be ſuperſeded, the under-ſheriff ſhall nevertheleſs continue in his office, and execute the ſame in the name of the deceaſed, till another ſheriff be appointed and ſworn; and the under-ſheriff ſhall be anſwerable for the execution, during ſuch interval, as the high-ſheriff would have been; and the ſecurity given by the under-ſheriff and his pledges ſhall ſtand a ſecurity to the King, and all perſons whatſoever, for the due performing of his office during ſuch interval." Stat. 3 *Geo. c.* 15. *ſect.* 8. See above, *chap.* 1. *p.* 45.

Not to practiſe as an attorney.

" No under-ſheriff, ſheriff's clerk, receiver, nor ſheriff's bailiff, ſhall be attorney in any of the King's courts, during the time that he is in office." Stat. 1 *Hen.* 5. *c.* 4.

Information *niſi* granted.

On motion for an information againſt one for acting as under-ſheriff, and alſo at the ſame time acting as an attorney contrary to the above ſtatute, rule was made to ſhew cauſe. 2 *Barnard. K. B.* 295.

Reaſons.

If the under-ſheriffs were allowed to practiſe as attornies, it would be a cauſe of encreaſing ſuits, a temptation to partiality, and an hindrance in the diſpatch of their proper buſineſs; but, notwithſtand-

ing the above act, under-ſheriffs (being uſually bred attornies) practiſe in the name of other attornies. *Wood's Inſt.* 74.

The ſheriff, in making an *under-ſheriff*, doth implicitly give him power to execute all the ordinary offices of the ſheriff himſelf that be transferrable by law, as ſerving proceſs, executions, and the like. 4 *Bac. Abr.* 440. *Hob.* 13.

In what caſes the high-ſheriff muſt execute the office in perſon.

But in ſome caſes the high-ſheriff muſt exerciſe the office himſelf in perſon, and the under-ſheriff may not do it; as,

On a writ of *partition*. *Cro. El.* 9, 10.

On a writ of *rediſſeſin*; for in that the ſheriff is judge. *Hob.* 13.

In a writ of *waſte*; for there the ſheriff is commanded to go to the place waſted. 4 *Bac. Abr.* 441.

In *juſticies*, the ſheriff himſelf is judge, or elſe all is *coram non judice*; and the under-ſheriff cannot hold plea in it. 2 *Leon.* 34. *pl.* 260. Yet in this caſe Lord *Coke* holds, that the ſuitors are judges, and not the ſheriff. 6 *Co.* 12, 13.

One perſon may be judge and officer in divers reſpects.

In all caſes where the words of the writ are, That the ſheriff ſhall go in his own perſon; as in an *accedas ad curiam*, *waſte*, *rediſſeiſin*, there the *under-ſheriff* cannot do it; and one may be judge and officer *in divers reſpects*: as the ſheriffs in rediſſeiſin, waſte, &c. ſo bailiffs in many antient corporations are judges and officers too, and the cuſtom is good. *Cro. Car.* 138. *Cro. Eliz.* 9, 10. *pl.* 1. *Freem.* 52, 53. *pl.* 65, 355. *pl.* 445.

Note, That if a ſheriff hath a court by preſcription, and hath uſed to execute proceſs himſelf, no action lies againſt him, becauſe he does it as judge.

But if an eſcheator returns a falſe office, contrary to what was found by the jury in prejudice of the party, an action lies; for he is not a judge, but an officer in this. 2 *Vent.* 26. *Palm.* 143.

Partition.

A writ of partition was awarded, and upon the examination of the under-ſheriff, he confeſſed the *high-ſheriff* was not there as he ought to have been; and a new writ was awarded.

Now

Now in the writs aforeſaid, where the ſheriff muſt do execution in his own perſon, if he be not there in perſon; if exception be taken at the bar before the return of them be received, the writ ſhall not be received: but if the ſheriff in ſuch writs returneth, *That he was there in proper perſon*, and this return be received, and the writ filed, then the court cannot examine it; for the return is good, and the party can have no averment againſt the return, nor can have any error. *Hob.* 13.

Exception that the ſheriff was not there in perſon, when to be taken.

It hath been adjudged that an aſſignment of priſoners by the under-ſheriff, is as valid as if made by the high-ſheriff himſelf. 4 *Bac. Abr.* 441, 446. *Barnes's Notes C. P.* 259. *Kel.* 125. *pl.* 101.

May aſſign priſoners.

An under-ſheriff, by virtue of his office, is included in ſeveral acts of parliament. 10 *Mod. arg.* 289.

Included in ſeveral acts of parliament.

Where a ſtatute appoints any thing to be done by the ſheriff, and preſcribes no particular manner for doing it, that makes it neceſſary to be a perſonal act, there the under-ſheriff may do it, though the ſheriff only is mentioned; but where the manner and circumſtances enjoined and preſcribed by the act, make it a perſonal act, he cannot. 10 *Mod. arg.* 290.

But all the ordinary offices of the ſheriff, are transferred to the under-ſheriff; and therefore if a ſheriff will make an under-ſheriff, provided that he ſhould not ſerve executions above 20 *l.* without his ſpecial warrant, this proviſo is void. For though the high-ſheriff may chuſe not to make an under-ſheriff at all, or may make him at will, and ſo remove him wholly, yet he cannot have him an under-ſheriff, and yet abridge his power, 12 *Mod.* 467. 2 *Brownl.* 281. no more than the King can in the caſe of the ſheriff himſelf, nor can the under-ſheriff reſtrain himſelf by covenant; as he being under-ſheriff, is liable to execute all proceſs; and he hath power to do all that the ſheriff can transfer. *Hob.* 13. *Cro. El.* 440. In the indenture between the high-ſheriff and under-ſheriff was an exception, *That the under-ſheriff ſhall not intermeddle with the execution of any writ above the ſum*

High-ſheriff may not abridge the under-ſheriff's power.

of

of 40 *l.* and *by the Court*, this exception was repugnant and void. *Godb.* 212. *Hob.* 12. *Brownl.* 63, 65. 12 *Mod.* 468. *Mo.* 856. *Noy* 51. *Het.* 157.

Under-ſheriff's care to have deputies in court, and to file warrants of attorney for his high-ſheriff.

The under-ſheriff ought always to have a deputy attendant in every of the courts of *Weſtminſter Hall*, to receive and execute their commands, and to give account of buſineſſes which may fall out about the ſheriff and his office, and ought to file a warrant of attorney for his high-ſheriff in every one of the courts of *Weſtminſter Hall*, by an attorney of each court, otherwiſe an action upon the ſtatute lies againſt his high-ſheriff for ſuch neglect. 2 *Lil. Abr.* 627.

Pleading by deputy his deputation without deed.

In caſe the plaintiff declares, he ſued *J. S.* on a *Latitat* directed to the ſheriff of *D.* and *J. S.* was arreſted; and the defendant pretending to be deputy to the ſheriff, took bond of him and let him at large. The defendant pleads, the ſheriff made him his deputy to bail all priſoners bailable in the county, and thereupon he took bond of *J. S.* and delivered it to the ſheriff, *&c.* The plaintiff demurs, becauſe he pleads his deputation without deed. By *Gawdy* it is good without deed, for a deputy doth things only as a ſervant, and in right of his maſter, and ſo may be without deed. *Cro. Eliz.* 67. but *Lit. Rep.* 135. 9 *Co.* 51. *b.* and *Jenk. Cent.* 110. *pl.* 14. all *contra.*

Reſcue from the ſheriff's deputy.

In reſcue, the bailiff of a liberty arreſted the party, and delivered him to the ſheriff's deputy, and ſaith not, from the ſheriff; yet it is good: for in an action on the caſe he ſhall ſhew the truth, as it is in fact. *Cro. Jac.* 242.

The deputy ſhall plead the general iſſue, as the officer himſelf, by the ſtatute 7 *Jac. c.* 5. *Mo.* 845. *pl.* 1141. See *Lil. Abr.* 611. how the law takes notice of the ſheriff's deputies, but not of deputies deputies.

Deputies deputies.

Any clerk of the ſheriff's appointment is to return a *Tales*. *Hob.* 357. *pl.* 48. *T. Raym.* 240. *Keb. Rep.* 357. *pl.* 48.

Sheriff taking bribes, or buying the place of under-ſheriff, *&c.*

If any ſheriff take hire, gift or bribe of any under-ſheriff, bailiff, keeper of the gaol, *&c.* for his place

lace or office, he may be indicted, fined or impri-
oned. 2 *Inſt.* 566.

In debt on an obligation to perform covenants, n *Oyer* it appeared that the plaintiff was under-ſhe-
ff by purchaſe, and ſo void.

Sheriffs of *London* not to take preſents of under-ſheriffs.

" No ſheriff of *London* and *Middleſex* ſhall take ny ſum or preſent for the execution of the place f under-ſheriff, nor oblige him to be at any ex-
ence in relation thereto, which has been uſually orne by the high-ſheriff; except the rewards given y any act for apprehending highwaymen, clippers, oiners and houſebreakers, and the fees for paſſing ch high-ſheriff's accounts in the *Exchequer*, and ch other diſburſements as have been cuſtomarily ſtained by the under-ſheriff." *Stat.* 5 *Ann.* 31.

Penalty of buying or ſelling any office under a ſheriff.

" It ſhall not be lawful for any perſon to buy, ll, or take to farm, the office of under-ſheriff or puty-ſheriff, ſeal-keeper, county-clerk, ſhire-clerk, oler, bailiff, or any other office pertaining to the ffice of high-ſheriff, or to contract for any of the id offices, on forfeiture of 500*l.* one moiety to his ajeſty, the other to ſuch as ſhall ſue in any court *Weſtminſter* within two years after the offence." at. 3 *Geo. c.* 15. *ſect.* 10.

Under-ſheriff may be ſued in the exchequer.

An action of falſe impriſonment, or other action, ay be brought againſt the under-ſheriff in the *Ex-equer*, although the high-ſheriff be officer of the urt; for the court takes notice of the under-ſheriff ſo.

Detaining after releaſe.

Falſe impriſonment againſt the under-ſheriff, for taining a priſoner after a releaſe made. *Rol. Abr.* 89. 3 *Bulſt.* 96, 97.

Not returning a writ of ſummons.

If the defendant, in a writ of error or *Diſſeiſin*, liver a writ of *Summons* to the under-ſheriff of the unty, and after he ſummons a tenant upon the nd accordingly, and notwithſtanding doth not re-rn the writ, action on the caſe may be brought ainſt the under-ſheriff, if the plaintiff will. For radventure the ſheriff had not notice of it, and e under-ſheriff took fees to execute the writ; and

it

it is ſaid *falſely and maliciouſly* for delay of the plaintiff, which is imbezilling it. *Leon.* 146. *Cro. El.* 175. 2 *Inſt.* 452. And *Quære* if an action lies, unleſs the writ be delivered *in pleno Com. &c.* according to the act. *Cro. El.* 873. for not returning a *Cap' Utl'*.

Arreſting wrong perſon.

If an under-ſheriff takes another perſon, he does wrong, and without warrant, and an action well lies againſt him. 2 *Keb. Rep.* 352. *pl.* 43.

Taking a wrong perſon's goods in execution.

If a ſheriff's bailiff on a writ of *Fieri facias* levies the wrong perſon's goods; the high-ſheriff may bring his action of covenant againſt the under-ſheriff. *Id. ib.*

Return amerciable, falſe return.

If the under-ſheriff make a return amerciable, there the high-ſheriff ſhall be amerced, for the return is made expreſly in his name: but if it be a falſe return whereupon an action of *Deceit* lies, in that caſe it may be brought againſt the under-ſheriff. *Doctor and Stud.* 134. *c.* 42. *Dalt. Sher.* 456.

If it be a queſtion whether the under-ſheriff made ſuch a return or not, it ſhall be tried by the under-ſheriff. *Cro. El.* 421. 21 *Vin. Abr.* 593. *pl.* 8.

Ordered to attend.

Under-ſheriff, on a *Fieri facias*, perſuaded the jury to prize the goods at an under value, perſuading them it would be better for the poor man the defendant; ſo that they apprized them, though worth eighty pounds, at 22 *l.* 13 *s.* 4 *d.* and he delivered them to the plaintiff for the ſaid ſum; this is oppreſſion, and inquirable at the aſſizes by indictment. And the court commanded that the under-ſheriff, being an attorney, ſhould be brought before them. *Cro. Jac.* 426. *pl.* 12. 19 *Vin. Abr.* 438. *pl.* 4. *Hawk. Pl. Cr. b.* 1. *chap.* 66. *ſ.* 2. *p.* 168.

Sheriff's deputy ſubſtracts a writ.

If a writ be ſubſtracted by a ſheriff's deputy, it is ſaid the deputy himſelf may be puniſhed. *Leon.* 146. *pl.* 203. *Cro. El.* 175. *pl.* 1.

For concealing a writ.

Warrant on *Fieri fac'* is directed to the under-ſheriff of a liberty, and he levies the debt, but conceals the writ; action on the caſe lies againſt him.

Mr.

It is a contempt in the under-ſheriff to return a writ to an infant plaintiff, which writ was ſued by guardian.

Mrs. *Stout*, (*a*) mother of Mrs. *Mary Stout*, ſued a writ of appeal out of *Chancery* againſt *Spencer Cowper*, eſq; youngeſt (*a*) ſon of Sir *William Cowper*, baronet, barriſter (*b*) at law, juſtice of peace, captain of the militia, [and afterwards King's (*c*) Counſel, and one of the (*d*) juſtices of the court of *Common Pleas*] for the ſuppoſed (*e*) murder of her daughter, in the name of an infant, who was a relation to the ſaid *Sarah Stout*, and her heir; and before the writ was returnable, procured herſelf to be admitted guardian to the infant in the ſaid appeal by the lord chief juſtice (*a*) *Holt*, at his chambers. After this, the friends and mother of the infant, being (*a*) influenced by the (*f*) *Cowpers*, went to the under-ſheriff with the infant, and demanded of him the writ of appeal, who delivered it accordingly; whereupon, after the return of the writ was expired, Mrs. *Stout* the guardian's counſel made a motion in the *King's Bench* that the under-ſheriff ſhould return the writ: and upon a rule made accordingly, that the under-ſheriff ſhould ſhew cauſe, why he ſhould not return the writ, the whole matter appearing upon the affidavits, and that the writ was burnt and ſo loſt, the queſtion was whether the redelivery of the writ by the defendant was a contempt to the court?

Holt ch. juſt. ſaid it was an inſufferable contempt, for under-ſheriffs by theſe practices hinder juſtice.

(*a*) Lord *Raym.* 555. *Salk.* 176.

(*b*) 12 *Mod.* 372.

(*c*) *Id.* 478.

(*d*) 2 Lord *Raym.* 1510. Append. to *Chron. Juridicial.* 17.

(*e*) See his trial in *Salmon's critical Review of the State Trials* 717. where you will find his obſervations upon that trial. He ſays, it was one of the moſt memorable ones in the age, and the world, to this day, divided in their opinions, concerning the innocency of the priſoner. *Id. Ibid.* It is the firſt trial in the collection, publiſhed in 1734, in four volumes folio.

(*f*) 12 *Mod.* 373.

The

The defendant was committed, then bailed, and at laſt fined 200 marks (*a.*)

In this (*b*) caſe, the year being expired, they could not have a new writ of courſe, and therefore, afterwards, in the vacation before (*c*) *Trinity* term, 1701, 13 *Will.* 3. a petition was preferred to Sir *Nathan Wright*, (*c*) lately made lord keeper of the great ſeal of *England*, to have a new writ of appeal granted. But upon the hearing of counſel on both ſides, more than ſix hours before him, aſſiſted by lord chief juſtice *Treby*, the lord chief baron *Ward*, and Mr. juſtice *Powel*, (whom my lord chief juſtice *Holt* ſent in his place) and Sir *John Trevor*, the maſter of the Rolls; by the unanimous opinion of them all, the petition was rejected. Some, (*d*) eſpecially *Treby*, alledging for reaſon, that an appeal was a revengeful odious proſecution, and therefore deſerved no incouragement; upon which occaſion *Holt*, with great vehemence and zeal, ſaid, "He wondered that any *Engliſhman* ſhould brand an appeal with the name of an (*e*) odious proſecution; for his part, he looked upon it to be a noble (*f*) remedy, and a true badge of the *Engliſh* rights and liberties, and referred to the ſtatute of *Glouceſter*, *chap.* 9. [6 *Ed.* 1. 1278.] (*g*) and the comment thereupon, in 2 *Inſt.* 314. which (*h*) ſtatute has provided, that an appeal ſhall not be abated ſo lightly as before it has been; but if the appellant declares the fact, the year, the day, the hour, the time of the King, and with what weapon, the appeal ſhall be maintained. And 3 *Hen.* 7. *chap.* 1. which gives power to proceed at the ſuit of the King within the year, does yet ſave the appeal to the party after acquittal. And therefore, ſince

(*a*) Lord *Raym.* 557. 12 *Mod.* 375.
(*b*) 12 *Mod.* 375.
(*c*) Lord *Raym.* 557.
(*d*) Lord *Raym.* and *Mod.* as laſt above.
(*e*) Lord *Raym.* and *Mod.* as laſt above.
(*f*) Lord *Raym.* as laſt above.
(*g*) 2 *Inſt.* 279.
(*h*) Lord *Raym.* as laſt above.

this

this remedy has been favoured by acts of parliament, and tends to the ſupport of families, and is of evident neceſſity in ſome caſes (to ſay nothing of this preſent caſe, but only that a very odd method has been taken, and that too publicly avowed, for withdrawing this appeal) the judges ought to encourage appeals. See Preface to lord ch. juſt. *Holt*'s life lately publiſhed.

The court of *King's Bench*, to ſhew their reſentment, committed the defendant to the priſon of the *King's Bench* for his fine, though the clerk in court would have undertook to pay it. Lord *Raym.* 557.

Holt ch. juſt. ſaid, that if any ſheriff in *England* was to refuſe to return a writ, he would lay him by the heels for the contempt; he obſerved that if the court was to ſuffer a writ to be delivered up, the ſubject muſt expect but little juſtice, for the ſheriffs would have it in their power to anticipate it. 12 *Mod.* 374. He concluded by telling the under-ſheriff, that he had not been in priſon long enough before: and that he might now, if he pleaſed, go to *Hertford*, and make his boaſt that he had got the better of the *King's Bench*. Ld. *Raym.* 557, 558.

CHAP. III.

Bailiffs.

Who.

SHERIFF's bailiffs, or bailiffs of hundreds, are thoſe under officers who more immediately belong to the ſheriff, and are appointed by him in every hundred, as his ſervants; they are to execute all writs directed to the ſheriff, by virtue of the ſheriff's precept or warrant, within the hundred.

Their appointment.

To execute writs.

They

To collect poſt-fines, &c. To attend judges, &c.

They are likewiſe to collect (*a*) poſt-fines, fee-farms of the King, &c. for the ſheriff; to attend juſtices of aſſize, gaol-delivery, and juſtices of peace, in every of their courts and ſeſſions. *Wood's Inſt.* 75. *Bac. Abr.* 231, 232. 2 *Burn's Juſt. qto.* 431. *Dalt.* 459.

Need not be ſworn.

Ordinary, or bum bailiffs need not take the oaths of allegiance and ſupremacy, or any (*b*) oath of office. 3 *Keb. Rep.* 552. *pl.* 63. See *Id.* 561. *pl.* 75. *Freem.* 419. *pl.* 555. *T. Jo.* 249.

Bailiffs.

Bailiffs, being officers, who are to execute the King's writs, are moſt commonly puniſhed in thoſe courts out of which ſuch writs iſſue, by attachment; but it is impoſſible to ſet down all ſuch miſdemeanors and oppreſſive practices of which the court is to determine, for which they ſhall be puniſhed; however attachments have been granted againſt them where they have uſed (*c*) needleſs force, violence and terror in making an arreſt; or where they have broke open doors where by law they ought not, and there was no plauſible excuſe for doing it; where they have treated the perſons arreſted baſely and inhumanly, or kept them in cuſtody till they conſented to pay money for their deliverance; or for making an arreſt without authority, by force of a blank warrant filled up with the name of a ſpecial bailiff, by the party himſelf, without the privity or ſubſequent agreement of the ſheriff; or if a bailiff levy a debt by virtue of an execution, and keep the money in his hands, and imbezil it; but even in theſe caſes there may be ſuch circumſtances or matters of alleviation as will induce the court to excuſe, if not wholly diſcharge them. *Bac. Abr.* 233. *Lil. Abr.* 266.

(*a*) He is not to collect them now. See *Stat.* 32 *Geo.* 2. *c.* 14.

(*b*) The under-ſheriff of *Middleſex* being called, confeſſed, that he ſwore all his under-ſheriffs. *Freem.* above.

(*c*) 2 *Hawk. Pl. Cr. chap.* 22. *ſect.* 3. *p.* 142.

A rule was made for the defendant to ſhew cauſe why an attachment ſhould not iſſue againſt a bailiff, for taking inſufficient bail, upon the arreſt of one on a bill of *Middleſex*. 8 *Mod.* 283. Attachment againſt bailiff for taking inſufficient bail.

An attachment was granted againſt a bailiff for executing a proceſs of the court, contrary to a rule of court, having notice of the rule, for this appeared a wilful contempt. *Lil. Abr.* 159. For executing proceſs contrary to rule.

" No ſheriff, bailiff, or other officer, ſhall convey any perſon arreſted by virtue of any proceſs to any public victualling or drinking houſe, or to the houſe of ſuch officer, or of any tenant or relation of his, without the conſent of the perſon arreſted; nor charge him for wine, victuals, or any other liquor or things whatſoever, ſave what he ſhall call for; nor ſhall cauſe him to call or pay for any ſuch liquor or things, except what he ſhall particularly and freely aſk for; nor ſhall take any greater ſum than is by law allowed for any arreſt, or for detaining, or waiting till the perſon arreſted have given an appearance or bail, or agreed with the perſon at whoſe ſuit he is arreſted, or until he be ſent to the gaol belonging to the county or place where ſuch arreſt ſhall be; nor ſhall take any reward for keeping the perſon arreſted out of gaol; nor ſhall carry any ſuch perſon to gaol within 24 hours from the time of ſuch arreſt, unleſs ſuch perſon refuſe to be carried to ſome ſafe and convenient dwelling houſe of his own nomination within a city, borough, corporation, or market town, in caſe ſuch perſon be there arreſted; or within three miles from the place where ſuch arreſt ſhall be, if the ſame be made out of any city, *&c.* ſo as ſuch dwelling houſe be not the houſe of the perſon arreſted, and be within the county or liberty in which the perſon was arreſted; and then it ſhall be lawful for ſuch officer to convey the perſon ſo arreſted, and refuſing to be carried to ſuch ſafe and convenient dwelling houſe, to gaol." *Stat.* 32 *Geo.* 2. *c.* 28. *ſect.* 1. Priſoners not to be carried to taverns.

" Every ſheriff, under-ſheriff, and bailiff of any liberty, and the reſpective ſecondaries and clerks ſitters in the compters in *London*, and all other perſons Copies of theſe clauſes to be ſhewn to priſoners.

ſons intruſted with the execution of proceſs, or who ſhall enter any actions, or make any warrant, or any writ or proceſs, in order to have the ſame executed, ſhall deliver a printed copy of the ſeveral clauſes in this act relating to bailiffs, and other officers and perſons employed under them to execute any proceſs, or who ſhall arreſt any perſon on any action entered, or otherwiſe, within their reſpective ſheriffwicks or juriſdictions, to every ſuch bailiff, &c. and ſhall make it part of the condition of every ſecurity given to any ſuch ſheriff or under-ſheriff, or bailiff of any liberty, by any bailiff or perſon employed to execute proceſs, that every ſuch bailiff, &c. ſhall ſhew and deliver a copy of the ſaid clauſes to every perſon he ſhall arreſt and carry to any public or other houſe where any liquor ſhall be ſold, and ſhall permit every ſuch perſon arreſted, or any friend of him or her, to read over the ſame clauſes, before any liquor or victuals be called for or brought to ſuch perſon under arreſt there; and in caſe any bailiff, &c. offend in the premiſſes, every ſuch offence, beſides the breach of the condition of ſuch ſecurity bond, ſhall be deemed a miſdemeanor in the execution of the proceſs on which ſuch perſon was arreſted, and ſhall be puniſhable as ſuch by this act." *Ibid. ſect.* 3.

How far the court grants informations againſt bailiffs.

Motion for an information againſt a bailiff for carrying a perſon, whom he had under an arreſt, to an alehouſe againſt his will; this being an offence againſt an act of parliament; and this he prayed notwithſtanding the proceſs was out of the *Common Pleas*; he ſaid he did allow, that there was a clauſe in the ſtatute, which gave the party injured a liberty to proceed in a ſummary method, by petition to the court out of which the proceſs iſſues; but he ſubmitted it, the party had a right to wave that liberty, and to proceed in the ordinary courſe of juſtice notwithſtanding. The court ſaid, that might be a matter proper to be conſidered of; ſo made a rule to ſhew cauſe. *Salk.* 45, 460. *Barnard. K. B.* 259.

On

On ſhewing cauſe, the court was of opinion, that though this was an offence before the act of parliament, yet the intent of the legiſlature was, that the offender ſhould be puniſhed only in a ſummary method, by applying to the court where the offence was committed; and therefore refuſed to interpoſe their authority by information. *Barnard. K. B.* 296.

Upon complaint of Mr. *Budgel* againſt the defendant, who was a bailiff, for refuſing to carry him to the houſe which he appointed, and for not reading the clauſe in the ſtatute of 2 *Geo.* 2. *c.* 22. when he arreſted him; the court ordered the defendant to pay Mr. *Budgel* 5 *l.* for his damages, together with his coſts; and likewiſe committed him for the contempt. 2 *Barnard. K. B.* 213. Conſtruction upon the ſtatute of 2 *Geo.* 2. *c.* 22. relating to arreſts.

Defendant petitioned againſt ſheriff's officers for extortion, *&c.* praying relief according to ſtatute 2 *Geo.* 2. *c.* 22. and the court made a rule for the bailiffs to ſhew cauſe why an attachment ſhould not be iſſued againſt them, and not to anſwer the matters complained of; the former having been the method conſtantly uſed here, and the latter againſt the uſe of the court. *Barnes* 26.

No bailiff or ſheriff's officer ſhall preſume to exact or take from any perſon, being in his cuſtody by arreſt, any warrant to acknowledge a judgment, but in the preſence of an attorney for the defendant, which attorney ſhall then ſubſcribe his name thereunto; upon pain of being ſeverely puniſhed for ſo doing. *Lil. Abr.* 115, 194. Where he muſt not take a warrant to confeſs a judgment.

Alſo it was held, that a warrant to confeſs a judgment taken of a man under arreſt, in the preſence of an attorney's clerk or ſolicitor, was void. See 2 *Stra.* 902. Neither may a ſolicitor, *&c.*

The ſheriff is not bound to execute attachments in perſon, but may do it by his bailiff. *Dy.* 241. 2 *Rol. Rep.* 457. Lord *Raym.* 21. And that which is done by the warrant of the ſheriff is done by the ſheriff himſelf, for *qui facit per alium, facit per ſe.* Attachment.

The extent.

A bailiff of an hundred may execute a writ out of the hundred where he is bailiff, for he is bailiff all the county over. *Lil. Abr.* 266.

Not to be prejudiced by the non-return, &c. of the ſheriff.

Sheriffs bailiff, ſhall not be prejudiced by the non-return or miſ-return of the ſheriff. The defendant (as bailiff of an hundred) took goods in execution on *Fieri fac'*, and ſold them, and delivered the money to the ſheriff; it is good, and no *Trover* lies againſt the ſheriff, for they did execute, *as the writ required.* *Leon.* 144. *pl.* 200.

Falſe return by ſheriff, no prejudice to bailiff errant.

The falſe return of the ſheriff ſhall not make the bailiff puniſhable in an action; for he is bailiff errant, and a mere ſervant. *Dr. & Stud. b.* 2. *p.* 127. As the bailiff juſtifies by ſheriff's warrant, plaintiff replies, the ſheriff returned upon the writ, *Tarde. Cro. El.* 181.

Action is for *Reſcous* againſt the ſheriff, not againſt the bailiff.

If a bailiff errant, or ſpecial bailiff, arreſt a man upon a *Capias ad ſatisfaciendum*, and after the priſoner reſcue himſelf, he at whoſe ſuit he was arreſted may not have an *Action on the Caſe* upon the eſcape againſt the bailiff, but he ought to have it againſt the ſheriff; for the bailiff is but a ſervant to the ſheriff. *Vin. Abr.* 573. *pl.* 3.

Evidence for ſheriff.

In an action againſt the ſheriff for a falſe return on two *Fi. fa.* the officers who took the goods in execution were called as witneſſes for the defendant; and the counſel for the plaintiff objected to their being ſworn, becauſe they generally gave ſecurity to the ſheriff. Here the chief juſtice ſaid, that did not yet appear, aſk them; upon which the officers owned they had given ſecurity, but that they had delivered the goods over to the aſſignees by order of the under-ſheriff, and they had a warrant from the under-ſheriff, which they called a *Superſedeas* for their ſo doing; and upon its being produced and read, their teſtimony was allowed, for that it appeared to be a full indemnity to them from the ſheriff for what they had done. *Gen. Syſt. of Bank.* 25, 26. *Law for and againſt Bank.* 289.

In

In an action againſt the ſheriff for a falſe return of *Non eſt inventus* on *meſne* (*a*) proceſs; lord chief juſtice *Raymond* refuſed to admit the ſheriff's bailiff who had the warrant, to be a witneſs upon the trial to prove, on behalf of the ſheriff, that he often endeavoured to have arreſted the defendant in the original action, on the *Ca.* (*a*) *ſa.* but could not; *ſed non allocatur*, for the bailiff was no legal witneſs, becauſe he is intereſted in the cauſe, having given ſecurity for his due executing proceſs, and by conſequence could not be a witneſs in his own cauſe. *Stra.* 650. 2 Ld. *Raym.* 1412.

Pleading by under-ſheriff's bailiff.

Under-ſheriff brought debt againſt one of his bailiffs on bond to ſave harmleſs in executing proceſs, *&c.* and aſſigns the breach that the bailiff had not executed ſuch his warrant ſent to him upon a proceſs directed to him out of the *Exchequer*, to levy iſſues upon certain lands. Defendant demurs, 1. Becauſe the warrant directed to him, was made out of the county. 2. It is not alledged, that the manor *A.* where he was by the warrant to levy the iſſues, is within the hundred where the bailiff had juriſdiction: *By the court*, it is a good exception, and the breach is not ſhewed to be within the obligation; becauſe a bailiff cannot execute a precept out of the hundred where he is bailiff. *Stil.* 18. *Al.* 10. For though the words of the condition were general, to make return of all warrants directed to him, yet it was to be underſtood of ſuch only as were to be executed within the hundred of which he was made bailiff. 2 *Saund.* 414.

No bailiff, *&c.* ſhall be bail in any action.

Whereas many inconveniencies happen in cauſes depending in this court, by reaſon that ſheriffs officers, bailiffs, and other perſons concerned in the execution of proceſs, offer themſelves, and are permitted to be bail in any actions, and for great ſums of money; now for prevention of the like miſchief and inconvenience for the future; it is ordered by

(*a*) Lord *Raymond* ſays, it was upon an execution, Sir *John Strange*, 92. on meſne proceſs.

the lord chief juſtice, and the reſt of the juſtices of this court, that from and after the laſt day of this preſent term, no ſheriff's officer, bailiff or other perſon concerned in the execution of proceſs ſhall be permitted or ſuffered to become bail in any action or ſuit depending in this court. *Lil. Abr.* 237. Rule of *Mich.* term 1732. 6 *Geo.* 2. *ſect.* 7. in *C. P.*

Per curiam, We have ſeen ſo much oppreſſion in letting the ſheriffs officers be bail, that we think proper to concur with the *Common Pleas* in a general rule, not to accept them or ſerjeants at mace. 2 *Stra.* 890.

In error objected to one of the bail, that he was a palace-court officer; but over-ruled, and the bail allowed. The rule of this court to prevent ſheriffs officers, and other perſons concerned in the execution of proceſs, from being bail, extends only to proceſs of this court, whereon defendants having been bailed by the officers who arreſted them, were greatly impoſed on and abuſed. 2 *Barnes* 79.

A palace court officer offered to juſtify himſelf in court as one of defendant's bail; plaintiff objected, that no ſheriff's officer, bailiff, or other perſon concerned in the execution of proceſs, can be bail by the general rule of *Mich.* 6 *Geo.* 2. Defendant anſwered, that by a caſe in error, *Eaſt.* 20 *Geo.* 2. The court had determined that ſaid rule related only to bailiffs executing proceſs of this court. The court exploded the doctrine of that caſe, which was determined (as thereby appears) in the abſence of the lord chief juſtice, and rejected the bail offered. They held that the rule extends to all bailiffs, officers, and others concerned in the execution of proceſs. The rule was made for the benefit of plaintiff, not merely to prevent impoſitions, and abuſe on defendants, as in ſaid caſe mentioned. An ancient rule of this court *Mich.* 1654. ſays, that no attorney ſhall be bail, and a modern rule *Mich.* 6 *Geo.* 2. ſays, that no attorney of this or any other court, or any perſon practiſing as ſuch, ſhall be bail; the

the rule is the ſame with reſpect to officers executing the proceſs of this and all other courts. *Suppl. to Barnes* 9, 10.

Action on the caſe againſt a bailiff for concealing a *Fieri fac'*, after he had levied the money upon it. *Rol. Rep.* 78.

Action againſt bailiff for concealing a writ of execution.

The bailiff of *Weſtminſter* had returned a bill of *Middleſex* with a *Superſedeas* out of *Chancery* becauſe it was with an *Ac etiam*; the court conceived the return void, and gave him only four days to return his writ, on pain of 100 *l.* and would not ſuffer him to take him by a new writ. *Lil. Abr.* 84.

For returning a bill of *Middleſex* with a *Superſedeas*.

If a diſtreſs at the ſuit of *A.* iſſues out of the court of *C.* directed to *J. S.* (who is not the uſual officer) to diſtrain the cattle of *B. &c.* or that *B.* ſhould find pledges to appear the next court; and thereupon *J. S.* diſtrains the cattle of *B.* and after redelivers them to *B.* without taking ſufficient ſecurity, *&c.* and *B.* does not appear; an action lies againſt *J. S.* for this deceit, notwithſtanding he is no known officer, but *hac vice* only; adjudged upon a writ of error. *Lat.* 159.

J. S. no uſual officer executes a diſtreſs, and delivers the cattle.

An action lies not againſt the bailiff for refuſing bail, but for not conveying the party before the ſheriff in order to put in bail. 2 *Mod.* 32.

Not carrying the party to put in bail.

If *A.* brings *B.* to a common inn, of which *C.* is hoſt; and affirms to *C.* that he hath arreſted *B.* by virtue of a commiſſion of rebellion; and in conſideration, that *C.* will keep *B.* as a priſoner by the ſpace of one night, aſſumes and promiſes to ſave *C.* harmleſs, *&c.* If *B.* recovers againſt *C.* in an action of falſe impriſonment, *C.* may have an action againſt *A.* upon this promiſe; for though the conſideration, *viz.* the keeping of *B.* was unlawful, yet becauſe it did not appear to *C.* to be ſo, the promiſe to ſave him harmleſs was good. *Hut.* 55. *Winch* 48.

A. at an inn deſires his hoſt to keep the priſoner one night, *&c.* and promiſes to ſave him harmleſs, *&c.*

CHAP. IV.

Arreſt.

As to the manner.

IT is commonly ſaid, a known bailiff need not ſhew his warrant, although it be demanded, nor a ſpecial bailiff without demand: As to *London*, it is ſaid, the ſerjeant need not ſhew his mace, becauſe he is ſworn and known, although not to the party. 9 *Co.* 69.

Shewing the warrant.

And yet it is held a general arreſt by a ſerjeant, by ſhewing his mace, and touching his body with it, by ſaying, Sir, *I arreſt you*, is not ſufficient, for he ought to ſhew at whoſe ſuit, out of what court, for what, and of what return the writ is, that the party may know what to do. *Bac. Abr.* 232. *Cro. Jac.* 485, 486.

What the officer is to ſay and do.

Where the ſheriff doubting a reſcue, cauſeth the ſerjeant of the mace to arreſt one firſt on an action of 100 *l.* entered in *London* according to cuſtom, and after the ſheriff arreſts him by *Cap. ad ſatisfac'*, this is unlawful, and the ſerjeant was ſeverely puniſhed, and the court diſliked ſuch feigned actions againſt law. 6 *Co.* 52. *Dalt.* 110.

Puniſhed for feigned action.

The ſheriff muſt not diſpute the authority of the court, though the proceſs be erroneous. *Ventr.* 273.

No diſputing proceſs.

If the officer comes to arreſt a man, and he flieth, the officer may purſue him and take him in another county, but he cannot beat him, *&c.* becauſe he was not arreſted. Lord *Raym.* 231. 2 *Stra.* 1049. If after the arreſt of the bailiff he flieth, or draws weapons, he may. *Dalt.* 111.

When the party flyeth.

Where perſons having authority to arreſt or impriſon, uſing the proper means for that purpoſe, are reſiſted in ſo doing, and the party making reſiſtance is killed in the ſtruggle, this homicide is juſtifiable. And on the other hand, if the party having autho-

Homicide in advancement of juſtice.

rity to arreſt or impriſon, uſing the proper means, happeneth to be killed, it will be murder in all who take a part in ſuch reſiſtance. For it is homicide committed in deſpite of the juſtice of the kingdom.

The rule laid down ſuppoſeth that reſiſtance is made. And upon that ſuppoſition it will, I conceive, hold in all cauſes, whether civil or criminal; for in the caſe of reſiſtance in either caſe, the perſon having authority to arreſt or impriſon may repel force with force, and if death enſueth in the ſtruggle he will be juſtified. This is founded in reaſon and public utility. For few men would quietly ſubmit to an arreſt, if in every caſe of reſiſtance the party impowered to arreſt was obliged to deſiſt and leave the buſineſs undone. The late Mr. juſtice *Foſter* thinks the opinion in *Rolle*'s (*a*) report too ſevere.

The caſe of bare flight in order to avoid an arreſt in a civil proceeding, and likewiſe in ſome caſes of a criminal nature, will fall under a different conſideration. A defendant in a civil ſuit being apprehenſive of an arreſt flyeth, the officer purſueth, and in the purſuit killeth him, *This* ſaith lord *Hale will be murder*. *Hal. Hiſt. Pl. Cr.* 481.

Mr. juſtice *Foſter* rather chooſes to ſay, it will be murder or manſlaughter, as circumſtances may vary the caſe. For if the officer in the heat of the purſuit, and merely in order to overtake the defendant, ſhould

(*a*) The caſe upon evidence was thus; one *Calfield* was in execution, for debt in the compter, and eſcaped, and the keeper came to the place where he was, to apprehend him, and *Calfield* flew out of the window, and the keeper purſued him, and in reſiſtance *Calfield* was killed; the keeper did not retreat ſo much as he might have done, and *Roll* thought it manſlaughter, becauſe he was only in execution for debt; but if a man impriſoned for felony eſcape, and the keeper upon reſiſtance kills him, this is manſlaughter without retreating, *&c.* The law is the ſame if a thief upon his own aſſault is killed, it is not manſlaughter. *Rol. Rep.* 189. *pl.* 24.

trip

trip up his heels, or give him a ſtroke with an ordinary cudgel, or other weapon *not likely to kill*, and death ſhould unhappily enſue, he cannot think that this will amount to more than manſlaughter, if in ſome caſes even to that offenſe. The blood was heated in the purſuit, his prey, *a lawful prey*, juſt within his reach, and no ſignal miſchief was intended. But had he made uſe of a deadly weapon, it would have amounted to murder. The miſchievous vindictive ſpirit, the *malitia*, which always muſt be collected from circumſtances, determineth the nature of the offenſe. *Foſt. Cr. Law* 270 *to* 271.

Something hath been ſaid briefly under the head of homicide in advancement of juſtice, touching the killing of officers in the execution of their offices, and of other perſons having authority to arreſt or impriſon, or acting under colour of ſuch authority. But this being a matter in which the juſtice of the kingdom is deeply concerned, I will now (ſays Mr. juſtice *Foſter*) ſubmit to conſideration my thoughts upon that ſubject more at large.

Miniſters of juſtice, while in the execution of their offices, are under the peculiar protection of the law. This ſpecial protection is founded in great wiſdom and equity, and in every principle of political juſtice. For without it the public tranquillity cannot poſſibly be maintained, or private property ſecured; nor in the ordinary courſe of things will offenders of any kind be ameſnable to juſtice. And for theſe reaſons the killing of officers ſo employed hath been deemed murder of malice prepenſe, as being an outrage wilfully committed in defiance of the juſtice of the kingdom.

This rule is not confined to the inſtant the officer is upon the ſpot, and at the ſcene of action, engaged in the buſineſs which brought him thither; for he is under the ſame protection of the law *eundo, morando, & redeundo.* And therefore if he cometh to do his office, and meeting with great oppoſition retireth, and in the retreat he is killed, this will amount to murder. He went in obedience to the

law

law and in the execution of his office, and his retreat was neceſſary in order to avoid the danger that threatened him. And upon the ſame principle, if he meeteth with oppoſition by the way, and is killed before he cometh to the place, *ſuch oppoſition being intended to prevent his doing his duty, which is a fact to be collected from circumſtances appearing in evidence*, this likewiſe will amount to murder. He was ſtrictly in the execution of his office, going to diſcharge the duty the law required of him. *Foſt. Cr. Law* 308 *to* 309.

The miniſters of juſtice in civil ſuits, under proper limitations, are intitled to the ſame protection for themſelves and followers, and upon the ſame principles of political juſtice. *Ibid.* 310.

And in the caſe of arreſts upon proceſs, whether by writ or warrant, if the officer named in the proceſs give notice of his authority, and reſiſtance is made, and the officer killed, it will be murder; if in fact ſuch notification was true, *and the proceſs legal.* For after ſuch notification the parties oppoſing the arreſt acted at their own peril. *Ibid.* 311.

I have ſaid above by way of caution, *if the proceſs be legal.* But I would not be underſtood to mean any thing more than, *provided the proceſs, be it by writ or warrant, be not defective in the frame of it, and iſſue in the ordinary courſe of juſtice from a court or magiſtrate having juriſdiction in the caſe.* There may have been error or irregularity in the proceeding previous to the iſſuing of the proceſs; but if the ſheriff or other miniſter of juſtice be killed in the execution of it, this will be murder. For the officer to whom it is directed muſt at his peril pay obedience to it. And therefore if *a Capias ad ſatisfaciendum, Fieri facias*, writ of aſſiſtance, or any other writ of the like kind iſſue directed to the ſheriff, and he or any of his officers be killed in the execution of it, it is ſufficient upon an indictment for this murder to produce the writ and warrant, without ſhewing the judgment or decree: ſo ruled by lord *Hardwicke* in the caſe of one *Rogers* at the ſummer

Evidence.

ſummer aſſizes in *Cornwall* in the year 1735. 8 *Geo.* 2.

Evidence. *Rogers* by the help of a gang of deſperate fellows ſtood out a long time in a *Chancery* ſuit, and kept poſſeſſion of the premiſſes in queſtion againſt all manner of proceſs: at length the ſheriff attended by the *Poſſe Comitatus* endeavouring to execute the proceſs, three of the *Poſſe* were killed by him or ſome of his gang, he preſent and abetting; for theſe murders he was tried and convicted; in the courſe of the trials the writs of execution, the injunction for delivering poſſeſſion, and the writ of aſſiſtance were read in evidence, but not the decree. *Foſt.* 311.

Mr. *Lutterel* being arreſted for a ſmall debt prevailed on one of the officers to go with him to his lodgings, while the other was ſent to fetch the attorney's bill, in order, as *Lutterel* pretended, to have the debt and coſts paid. Words aroſe at the lodgings about *civility money*, which *Lutterel* refuſed to give; and went up ſtairs pretending to fetch money for the payment of the debt and coſts, leaving the officer below. He ſoon returned with a brace of loaded piſtols in his boſom, which at the importunity of his ſervant he laid down on the table, ſaying, *He did not intend to hurt the officers, but he would not be ill uſed.* The officer who had been ſent for the attorney's bill ſoon returned to his companion at the lodgings; and words of anger ariſing *Lutterel* ſtruck one of the officers on the face with a walking cane, and drew a little blood. Whereupon both of them fell upon him, one ſtabbed him *in nine places, he all the while on the ground begging for mercy and unable to reſiſt* them. And one of them fired one of the piſtols at him *while on the ground*, and gave him his death's wound. This is reported to have been held manſlaughter *by reaſon* of the firſt aſſault with the cane.

This is the caſe as reported by Sir *John* (a) *Strange*; and an extraordinary caſe it is; that all

(a) *Stra.* 499.

theſe

theſe circumſtances of aggravation, two to one, he helpleſs and on the ground begging for mercy, ſtabbed in nine places and then diſpatched with a piſtol; that all theſe circumſtances, plain indications of a deadly revenge or diabolical fury, ſhould not outweigh a ſlight ſtroke with a cane.

But in the printed (*a*) trial there are ſome circumſtances ſtated, which are entirely dropped, and others very ſlightly mentioned by the reporter.

1. Mr. *Lutterel* had a ſword by his ſide, which, after the affray was over, was *found drawn and broken*. How that happened did not appear in evidence; for part of the affray was at a time when no witneſs was preſent, no body ſpoke to the whole.

2. When *Lutterel* laid the piſtols on the table, he declared that he brought them down, *becauſe he would not be forced out of his lodgings*.

3. He threatened the officers ſeveral times.

4. One of the officers appeared to have been wounded in the hand with a piſtol ſhot, (for both the piſtols were diſcharged in the affray) and ſlightly on the wriſt with ſome ſharp pointed weapon: and the other was ſlightly wounded in the hand with a like weapon.

5. The evidence touching *Lutterel*'s begging for mercy was not that he was on the ground *begging for mercy*; but that on the ground *he held up his hands as if he was begging for mercy*.

The chief juſtice directed the jury, that if they believed Mr. *Lutterel* endeavoured to reſcue himſelf, which he ſeems to think was the caſe, and very probably was the caſe, it would be juſtifiable homicide in the officers. However, as Mr. *Lutterel* gave the firſt blow *accompanied with menaces to the officers, and the circumſtance of producing loaded piſtols to prevent their taking him from his lodgings*, which it would have been their duty to have done, if the debt had not been paid or bail given, he declared it

(*a*) 6 *St. Tri. p.* 195. Trials publiſhed in the year 1734. *p.* 435. *Salm. St. Tr. abr. p.* 874.

could

could be no more *than Manſlaughter*. *Foſt. Cr. Law, chap.* 5. *p.* 292.

The direction of the chief juſtice the reporter hath totally omitted. And therefore I have taken the liberty to ſtate the caſe more largely than otherwiſe I ſhould have done. And I cannot help ſaying, that the circumſtances omitted in the report are too material, and enter too far into the true merits of the caſe to have been dropped by a gentleman of Sir *John Strange*'s abilities and known candour, if he had not been over-ſtudious of brevity.

Imperfect reports of facts and circumſtances eſpecially in caſes where every circumſtance weigheth *ſomething* in the ſcale of juſtice, are the bane of all ſcience that dependeth upon the precedents and examples of former times. *Foſter's Cr. Law* 294.

Arreſt by a bailiff's follower.

A bailiff ſtood at the ſtreet door, and ſent his ſervant up three pair of ſtairs in a diſguiſed habit with the warrant, who laid hands on *W. R.* and told him, that he arreſted him. *Holt* chief juſtice doubted if this was a good *arreſt*, being done by *the bailiff's follower* or ſervant, and *not in the preſence of the bailiff himſelf*; but ſaid, that the plaintiff muſt prove his cauſe of action againſt *W. R.* and muſt prove the writ and warrant by producing the ſworn copies of them. And he muſt prove the manner of the arreſt, that it may appear to the court to be a lawful arreſt; and in point of damages, he muſt likewiſe prove the loſs of his debt, *viz.* that *W. R.* became inſolvent, or could not be retaken. 3 *Salk.* 311. 6 *Mod.* 211. If a bailiff, having a warrant from a ſheriff on a *Capias*, *ſends another* in his room to arreſt the perſon, ſuch arreſt *is illegal* by *Holt* ch. juſt. 12 *Mod.* 73.

Evidence.

A *Capias* was returnable on *All Souls* day, a *Non dies juridicus*, which the ſheriff returned, and ſo let the party go: *Court*, it is a bad return; the writ was good, and the detaining of the party on it lawful, and he was commanded to bring him into court. *Poph.* 205.

As to time. On a *Sunday*.

" No perſon upon the Lord's day ſhall ſerve or execute any writ, proceſs, warrant, order, judgment, or

r decree, (except in caſes of treaſon, felony, or reach of the peace) but the ſervice of ſuch writ, &c. ſhall be void, and the perſons executing the ſame hall be liable to anſwer damages, as if they had done he ſame without any warrant." Stat. 29 *Char.* 2. . 7. *ſect.* 6. *Watſ. Clerg. Law, chap.* 34. *p.* 344, 345. *Gibſ. Cod. tit.* 10. *p.* 238. 12 *Mod.* 607.

The queſtion was, Whether ſerving an attachment for contempt on *Sundays* were within the above tatute? The words being, That all arreſts on *Sunday*, except for breach of peace, are void. *Holt* chief uſtice ſaid, Suppoſe it were a warrant to take for orgery, perjury, &c. ſhall they not be ſerved on *unday?* Sure the Lord's day ought not to be a anctuary for malefactors! And this here partakes f the nature of proceſs upon an indictment; *but the ourt would adviſe thereon.* 12 *Mod.* 348. A warrant or good behaviour may be executed on a *Sunday.* *T. Raym.* 250.

If a bailiff arreſts a man of a *Sunday*, ſince by the bove ſtatute all ſuch arreſts are unlawful, and the ailiff is killed in the making it, perhaps (ſays *Hawkins)* this will be manſlaughter only. *Hawk. Pl. Cr.* 86. *chap.* 31. *ſect.* 58. See *Hale's Hiſt. Pl. Cr. Note (F.) S. P.*

Kelynge, upon a motion of Mr. *Holt*, ſaid, I have known many attachments for arreſting of a *Sunday.* *Mod.* 56. *pl.* 112. 2 *Bulſtr.* 72. Note; *This was before the above bill paſſed into a Law.*

But then the affidavit always contained, that the party might have been arreſted on any other day. *Cro. Jam.* 602. *pl.* 6. *Mod. ibid.*

Motion to have defendant diſcharged out of cuſtody, for that he had been arreſted on a *Sunday* by proceſs out of *K. B.* but in truth he was taken without any warrant on a *Sunday*, and kept lock'd up till *Monday* morning, and then a writ was got. *By the court:* If you were impriſoned without warrant, you have your remedy by falſe impriſonment; but then let them ſhew cauſe why an attachment ſhould not go againſt them. And it was ſaid by *Gould*, that attachments

tachments have gone frequently in ſuch a caſe; and ſo was the rule here. 6 *Mod.* 96.

Arreſt on a *Sunday* is a void arreſt, inſomuch that the party may have an action of falſe impriſonment for it. *Salk.* 78. *pl.* 1. 5 *Mod.* 95.

Defendant taken on a *capias utlagatum* on a *Sunday*, moved to be diſcharged, the taking being contrary to the ſtatute of 29 *Car.* 2. *c.* 7. *ſect.* 6. The court held the taking bad, but refuſed to grant an attachment, and put the defendant to take the remedy given by the ſtatute. *Barnes's Notes, C. P.* 228.

"Any perſon may be taken on the Lord's day by virtue of an eſcape (*a*) warrant." 5 *Anne, c.* 9. *ſect.* 3. See 1 *Anne, ſtat.* 2. *c.* 6.

A priſoner eſcaped, and was retaken on a *Sunday* by virtue of a judge's warrant, called an eſcape warrant. The queſtion was, Whether this taking was ſuch ſervice of proceſs as was againſt the act of 29 *Car.* 2. *c.* 7. *By the whole court:* This is a taking in nature of a freſh purſuit, and is no original proceſs, and the gaoler or party might have taken him upon a freſh purſuit on a *Sunday* before this ſtatute. 6 *Mod.* 95. 2 *Salk.* 626. *pl.* 7. *S. C. S. P.* 3 *Salk.* 149. *pl.* 1. *S. P.* 2 *Ld. Raym.* 1028.

The party is in ſtill upon the old commitment continued down. 2 *Salk. ibid.* 2 *Ld. Raym.* 1028. ſays it was held, that this re-taking is not within the meaning of the ſtatute 29 *Car.* 2. and that he might have been re-taken on a *Sunday* without a warrant. 6 *Mod.* 3 *Salk.* and 2 *Ld. Raym.* ſay, that it was held otherwiſe in *C. P.* and the two laſt books ſay, that the barons of the *Exchequer* were equally divided; and 2 *Ld. Raym.* 1029. that the like motion was made before in the ſame term in *K. B.* and the court was then of the ſame mind.

The bail may take the principal on a *Sunday*, and confine him till *Monday*, and then render him; and this is no ſerving of proceſs, for the entry in *K. B.* is, *he is delivered upon bail*, &c. 'Tis rather like the caſe where the ſheriff arreſts the defendant on a

(*a*) See *Chap. Eſcape.*

Saturday,

Saturday, who eſcapes, he may take him on a *Sunday*, becauſe it is only a continuation of the former impriſonment. 6 *Mod.* 231, *Forteſc. Rep.* 374. *S. P.*

The court was moved, that one arreſted on a day of thankſgiving appointed by the parliament, was forced to put in bond to the ſheriff for his appearance, might be diſcharged, and that the bond given to the ſheriff might be delivered up. *Rol.* C. J. anſwered, indict the bailiffs who made the arreſt, or bring your action againſt them if you pleaſe, for we will not diſcharge the party arreſted. *Styl.* 238, 239. On a thankſgiving day.

It was ſaid by *Richardſon* C. J. That, upon arreſting a man upon *Chriſtmas-day*, going to church in the church-yard, he who made the arreſt might be cenſured in the *Star-chamber* [this court is aboliſhed by 16 *Char. c.* 10.] for ſuch an offence; *which note Hetly.* 19. *Godolph. Repert. Canon.* 115. *ſect.* 12. On *Chriſtmas-day*.

An arreſt in the night as well as in the day is lawful, and as well at the ſuit of a ſubject as at the King's; for the officer or miniſter of juſtice ought to arreſt him when he can find him, for otherwiſe perhaps he will never arreſt him, *becauſe he who has done amiſs hates the light*, 8 *Co.* 37. *b.* and if the officer does not arreſt him when he finds him, and may arreſt him, plaintiff ſhall have an action upon his caſe, and recover all his loſs in damages. 9 *Rep.* 66. *Cro. Jam.* 280. *pl.* 10. 486. 3 *Salk.* 46. *Jenk. Cent.* 291. *Ca.* 30. *Hale's Pl. Cr.* 45, 5 *Co.* 92. *b.* See *Owen* 63. In the night.

If a writ is returnable on the *ninth* day of *February*, or *in eight days of the Purification*, defendant cannot be arreſted by virtue of ſuch writ, either on the *tenth* or *eleventh* day of *February*, though it is before the *quarto die poſt*, (the fourth day after.) [The *quarto die poſt* is only for appearance and return of the writ, but not for execution. *Mo.* 701. *pl.* 998. *Cro. Eliz.* 760. *pl.* 33.] If he is arreſted, the officer cannot juſtify it, either in treſpaſs or falſe im- After the eſſoin or return day of the writ.

priſonment brought againſt him. *Cro. Eliz.* 761. *pl.* 33. *Mo.* 711. *pl.* 998. *Keb.* 805. *pl.* 75. *Sid.* 229. *pl.* 27. *Lev.* 143. *Winch.* 76. But if defendant be taken on a *capias ad ſatisfaciendum* on the *ninth* day of *February*, which is the very day the writ was returnable, the arreſt is good. 3 *Salk.* 46.

In treſpaſs of aſſault and battery by ſpecial verdict, it appeared that the defendant, as bailiff of the ſheriff, arreſted the plaintiff the *tenth* day of *February*, on a writ of *non omittas* out of *C. P.* which was returnable in *eight days of the Purification*, which was after the firſt or *Eſſoin* day; but the days of grace to the return of the writ are two days after: and the court conceived, that although the ſheriff may return his writ after, yet his office, as to arreſting, is determined on the *Eſſoin* day, which being no moveable feaſt, the court may take notice of the day of the month. *Keb.* 718. *pl.* 47.

The utmoſt length of time the law allows for executing a writ, is the day on which it is returnable, and it is not executable that day any longer than the court ſits. *Salk.* 322. *pl.* 8. 6 *Mod.* 130.

As to place. Palaces and verge of the court.

No arreſt muſt be in the King's palace, where his royal perſon reſides. 6 *Mod.* 73. 3 *Salk.* 91. *pl.* 1. 284. *pl.* 12. 2 *Ld. Raym.* 978. *Holt* 590. *pl.* 2. *Prynne's* 4 *Inſt.* 19. 3 *Inſt.* 140, 141.

"The great manſion-houſe purchaſed by the King late parcel of the poſſeſſions of the archbiſhop of *York* and the *park*, and the ſoil of the antient palace of *Weſtminſter*, ſhall be the King's whole palace of *Weſtminſter*, and ſhall extend to all the ſtreets leading from *Charing-Croſs* unto the *Sanctuary-gate* of *Weſtminſter*, and in all the houſes on both ſides of the ſtreets from the ſaid *Croſs* unto *Weſtminſter-hall*, ſituate between the *Thames* on the *eaſt*, and the *park* wall on the *weſt*." Stat. 28 *H.* 8. *c.* 12.

"The court of the ſteward and marſhal of the King's houſe, (*viz.* the *Marſhalſea* court) ſhall not paſs the ſpace of twelve miles, to be counted about the lodging of the King." Stat. 13 *Ric.* 2. *ſt.* 1. *c.* 3.

Arreſt

Arreſts ought not to be of perſons going to or coming from church, in the church-yard, *Hetl.* 19. *Godolph. Rep. Canon.* 115. nor in the time of divine ſervice, ſtat. 1 *Rich.* 2. *c.* 15. 50 *Ed.* 3. *c.* 5. *Cro. Jam.* 602. *pl.* 6. unleſs at the King's ſuit. *Cro. Jam.* 321. *pl.* 4. 2 *Bulſtr.* 72. *Godolph. Rep. Canon.* 141. *ſect.* 8. Church and church-yard.

Holt C. J. ſaid, he had known many attachments granted for arreſting a man as he was going to church, to diſgrace him. *Mod.* 56. *pl.* 114. *Watſ. Clerg. Law, chap.* 34. *p.* 345.

All perſons whoſe attendance is neceſſary in any of the King's courts at *Weſtminſter*, are privileged from arreſts. *Cromp. Juriſdic. of Courts* 11. Courts of juſtice.

But one who is not privileged from arreſts, by reaſon of his attendance upon buſineſs, upon ſome court of juſtice, or ſome other way privileged by ſome ſpecial rule or order of court, may be arreſted in *Weſtminſter-hall*, the courts ſitting there; and it hath been often done, for it is not the place but their buſineſs, that protects the party. 2 *Lil. Abr.* 115. *(F)*

One arreſted in *Weſtminſter-hall, ſitting the court*, may be diſcharged upon motion, if the arreſt was upon mean proceſs, but not if he was taken in execution; but even in that caſe the officer is puniſhable. *By the court.* 3 *Salk.* 46. *Bulſtr.* 85.

One *Long* was arreſted in the *Palace-yard*, not far from *Weſtminſter-hall* gate, the court being then ſitting; and being an attorney of this court, he, together with the officer, was brought into court, and the officer was committed to the *Fleet*, that he might learn to know his diſtance; becauſe the plaintiff was attorney of the court of *King's bench*, who informed this court, that his cauſe of action was for 200*l.* Therefore the court ordered, that another of the ſheriff's bailiffs ſhould take charge of the priſoner, and that Mr. *Robinſon*, the chief prothonotary, ſhould go along with him to the court of *King's bench*, which was done; and that court being informed how the caſe was, diſcharged the defendant upon filing common bail. The writ upon which *Long* was arreſted was an attachment of privilege, which the court ſup-

poſed to be made on purpoſe to ouſt him out of his privilege; for there was another writ againſt him at the ſheriff's office, at the ſuit of another perſon. 2 *Mod.* 181.

Liberties. If one be arreſted by the ſheriff of the county, within a liberty, without a *non omittas*, yet the arreſt is good; for the ſheriff is ſheriff of the whole county, but the bailiff of the liberty may have his action againſt the ſheriff for entering of his liberty: but, upon a *quo minus*, a ſheriff may enter any liberty, and execute it ſafely. *Lil. Abr.* 115. *(B.) Readings on the Statute Law* 116. *Barnard. K. B.* 282, 444.

Motion that proceedings might be ſtaid, upon an affidavit that the arreſt was made within the liberties of *London* upon a bill of *Middleſex*. But the court ſaid, that the affidavit was not ſufficient, for the liberty of *London* may extend into *Middleſex*, though no part of *London* itſelf does. And judge *Page* ſaid, The borough of *Southwark* is within the liberty of *London*, though it lies in the county of *Surry*. The ſame, he ſaid, has been thought of the *Temple*, that it lies within the liberty of *London*, though out of the city and county. Accordingly the motion was not allowed. 2 *Barnard. K. B.* 36.

Defendant was arreſted in the *Temple*, and, upon a motion to ſet it aſide, it was inſiſted for him, that the *Temple* is privileged from arreſts by the King's grant. *Dugdale's Orig. Jur. chap.* 57, 70. *p.* 144, 310. *edit.* 1671. *Stow's Survey of London*, 271, *edit.* 1720.

But by *Holt* C. J. if the King hath made ſuch a grant, it is void in law, they having no court of juſtice within themſelves there. It is true, the *Temple* is *extraparochial*, and not within any pariſh, nor within the city, ſo as to come within the cuſtoms of the city, but it is within the county of the city; but the *White Friars* is within the juriſdiction of the city: yet the court inclined not to countenance arreſts in the *Temple*, eſpecially in *term time*, but would not ſet aſide this arreſt, ſo defendant was held to ſpe-

cial

cial bail. 3 *Salk.* 285. *pl.* 13. 45. *pl.* 1. 12 *Mod.* 155. *Skin.* 684. *pl.* 5.

The liberty of the *Rolls* is no privileged place, but as it is for all other courts *going and returning*. *Freem.* 368. *pl.* 474.

The *cinque ports* be *Haſtings*, *Dover*, *Hithe*, *Romney* and *Sandwiche*, whereunto *Winchelſey* and *Rye*, (as of moſt note) and other towns be joined. 2 *Inſt. c.* 7. *p.* 556. See *Jeake's Charters of the Cinque Ports*, printed in the year 1728. The cinque ports.

The privilege of the *cinque ports* extends only to the inhabitants, but not to ſtrangers. *Freem.* 12. *pl.* 11. Nor where the matter or cauſe ariſes without the *cinque ports*. *Godb.* 90. *pl.* 102. *Brownl.* 34. Nor to an action of debt, or treſpaſs tranſitory. *Cro. Eliz.* 910. *pl.* 22. *Yelv.* 12.

Defendant ought to be an inhabitant, otherwiſe treſpaſſes committed within the *cinque ports*, by one who lived out of their liberty, or who would preſently abſent himſelf, would be diſpuniſhable; and the reaſon of the privilege of the *cinque ports* is, that the inhabitants there, who are to defend the port towns, ſhould not be drawn away, which does not extend to ſtrangers. *Freem.* 13.

Where a ſtranger comes within the *cinque ports*, and does a tranſitory treſpaſs, and after goes out of their juriſdiction, he to whom the treſpaſs was done may have an action at common law, elſe he would be without remedy; for they can call none in who are out of their juriſdiction, and the privileges were granted for the eaſe and benefit, and not the prejudice of the inhabitants. *Yelv.* 12. 2 *Inſt. c.* 7.

By the charters granted to the univerſities of *Cambridge* and *Oxford*, [bearing date reſpectively in the 4th year of the reign of King * *Richard* II. and the firſt day of *April* in the 14th year of King *Henry* VIII. both which were confirmed by ſtat. 13 *Eliz. c.* 29.] they may enquire of all treſpaſſes, injuries, and of all The univerſities.

* *Cro. Car.* 87. *pl.* 9. ſays it was 3 *Rich.* 2. *Barnard. K. B.* 49. ſays King *Edward* the *third* granted them a charter.

pleas and quarrels, and of all other crimes and matters, (except pleas of freehold, *Lit. Rep.* 252. *Cro. Char.* 87. *pl.* 9. *Vern.* 212. *pl.* 209. *Jenk. Cent.* 117. *pl.* 33. 3 *Salk.* 283. *pl.* 6.) where a ſcholar, their ſervants or miniſters, are one of the parties, and are to have cognizance and correction thereof, according to their ſtatutes or cuſtoms, or according to the law of our kingdom of *England*, at the will of the chancellor; ſo that the juſtices of the *King's Bench*, or of the *Common Pleas*, or the juſtices of aſſize, do not intermeddle; and if the ſaid juſtices ſhould preſume to enquire, or in any manner take cognizance of, or intermeddle, that then, upon the certificate, notification, or ſignification of the chancellor of the univerſity, or his commiſſary, they do ſuperſede ſuch inquiſition or cognizance, and not put the parties to anſwer before them, but that the party ſhall be chaſtized and puniſhed before the chancellor, or his commiſſary only. 10 *Mod.* 126, 128. *Cro. Char.* 73. *pl.* 1. *Lit. Rep.* 40, 41. *Hardr.* 505. *pl.* 4.

The privilege of the univerſities is not allowable, unleſs one of the parties is a ſcholar or ſervant of a college, and reſident at the univerſity at the time of the ſuit commenced, and it is ſufficient if one party only is a member; but if either party is entered into a college by a trick to avoid a ſuit in *R. B.* his privilege ſhall not be allowed him. *Salk.* 343. *pl.* 2. *Lit. Rep.* 304. 2 *Brownl.* 74. *Barnard. K. B.* 49, 50. *Comb.* 171. *Lit. Rep.* 41. *Hetl.* 26. See *Hardr.* 509. 2 *Ventr.* 106. *Godb.* 404. *pl.* 485. 3 *Salk.* 383. *pl.* 7.

The privilege of the univerſities is not allowed againſt the privilege of the *Common Pleas*, *King's Bench*, or *Exchequer*, or in an action againſt a ſcholar and another perſon who is not privileged, nor where the contract is made out of the univerſity; nor does it extend to ſue there for the penalty of an act of parliament, nor to a replevin. *Ld. Raym.* 342. *Hetl.* 26. *Lit. Rep.* 41, 304. *Cro. Eliz.* 180. *pl.* 13. *Hardr.* 188. *pl.* 15, 507. *Hetl.* 28. *Brownl.*

Brownl. 74. 3 *Bulſtr.* 272. *Skin.* 265. *pl.* 3. *Fitzgib.* 153. *pl.* 6. 294. *pl.* 3.

Suing in the *Exchequer* by *quo minus*, if plaintiff is neither accountant nor debtor to the King, nor an officer of the court, will not ouſt a member of the univerſity of his privilege, if demanded before imparlance. *Hardr.* 504. 10 *Mod.* 128. 3 *Salk.* 383. *pl.* 8.

A *quo minus* is not a writ or bill of privilege, nor is it ſo called, as when privileged perſons ſue in the courts where they are privileged. *Dy.* 328. *pl.* 9. 3 *Leon.* 323. *pl.* 300. But if plaintiff were an accountant, and entered upon his account, that would alter the caſe, becauſe his attendance then would be requiſite *from day to day*. But a *quo minus* is now but a common action in the *Exchequer*; it did not lie unleſs a debt were confeſſed to the King, and then the King's debtor had a *quo minus* for the King's benefit. *Hardr.* 507.

Pretended privileged places.

" Any perſon who hath any money owing him from any perſon who ſhall be in *White Friers*, *Savoy*, *Saliſbury-court*, *Ram-alley*, *Mitre-court*, *Fuller's Rents*, *Baldwin's Gardens*, *Mountague-cloſe*, or the *Minories*, *Mint*, *Clink*, or *Deadman's Place*, upon legal proceſs taken out againſt ſuch perſon, may require the ſheriffs of *London* and *Middleſex*, head bailiff of the liberty of the dutchy of *Lancaſter*, or high-ſheriff of *Surry*, or bailiff of the borough of *Southwark*, or their officers, to take the *poſſe comitatus*, or ſuch other power as ſhall ſeem requiſite, and enter the ſaid pretended privileged places, and arreſt, and in caſe of reſiſtance or refuſal to open the door, to break open any door to arreſt ſuch perſon, upon any meſne or other proceſs, or to ſeize the goods of ſuch perſon upon any execution or extent; and if the ſheriff, *&c.* ſhall neglect with ſuch force to do their beſt endeavours for the executing of ſuch proceſs, he ſhall forfeit to the plaintiff 100*l.* And if, in the execution of ſuch proceſs, any perſon ſhall oppoſe any officer, he ſhall forfeit 50*l.* and be by ſome juſtice of peace committed to the common gaol until the next aſſizes and gaol delivery, and ſuch offender being convicted, ſhall ſuffer impriſonment and be ſet in the

pillory; and if any reſcous be made of any priſoner taken by ſuch officers, within the ſaid places, the perſons making reſcous or aſſiſting, being convicted, ſhall forfeit 500 *l.* to the plaintiff; and if the perſon againſt whom ſuch recovery ſhall be had, neglect to pay the ſum recovered, with coſts, within one month after judgment and demand made, upon producing a copy of the judgment, and oath made that the money is not paid, he ſhall by order of ſuch court wherein he was convicted of ſuch reſcous, be tranſported for ſeven years; and if any perſon, inhabiting within any of the ſaid places, ſhall conceal any perſon who ſhall have made any reſcous, (knowing of ſuch offence), being convicted, he ſhall be tranſported for ſeven years, unleſs in one month he ſhall pay the plaintiff the debt for which he brought his action, with coſts." *Stat.* 8 & 9 *W.* 3. *c.* 27. *ſect.* 15. The ſame is enacted as to the *Hamlet* of *Wapping*, *Stepney*, or other pretended privileged places within the bills of mortality of the cities of *London* and *Weſtminſter*, by *Stat.* 11 *Geo. c.* 22. *ſect.* 1, 2.

"If any perſon within *Suffolk Place*, or the *Mint*, or the pretended limits thereof, knowingly oppoſe any perſon ſerving any writ, rule, or order, or other legal proceſs, or any eſcape warrant, or any juſtice of peace's warrant, or ſhall aſſault or abuſe any perſon ſerving ſuch writ, &c. whereby ſuch perſons ſhall receive any damage or bodily hurt, every perſon being convicted thereof ſhall be guilty of felony, and be tranſported." 9 *Geo. c.* 28. *ſect.* 1.

"And upon complaint to any three juſtices of peace for *Surry*, by any perſon who hath any debt owing him from any perſon reſiding in *Suffolk Place* or the *Mint*, &c. (ſuch creditor having legal proceſs taken out for recovery of his debt, and making oath before ſuch juſtices, that a debt exceeding 50 *l.* is juſtly due to him from the perſon againſt whom ſuch complaint ſhall be made, and that he believes ſuch perſon doth reſide in that place), it ſhall be lawful for the juſtices to iſſue their warrant to the ſheriff of *Surry*, or the bailiffs of *Southwark*, requiring

quiring them to take the *Poſſe Comitatus*, or ſuch other force as they ſhall think requiſite, and enter the ſaid *Mint*, and arreſt; and in caſe of reſiſtance or refuſal, to break open any door to arreſt ſuch perſon, upon meſne or other proceſs, and to ſeiſe goods upon execution or *Extent*; and the ſheriff, *&c.* refuſing, on ſuch warrant with ſuch force to uſe his beſt endeavours for the executing ſuch proceſs, ſhall forfeit to the plaintiff 200 *l.* and if any perſon ſhall reſiſt any officer of juſtice, or any perſon aiding ſuch officer within the *Mint*, *&c.* or ſhall reſcue any priſoner taken upon ſuch writ, *&c.* within the ſaid place, or ſhall there knowingly conceal any priſoner ſo taken, or any who reſcued ſuch priſoner, or ſhall be aſſiſting in reſiſting ſuch officer, or in reſcuing ſuch priſoner, or ſhall exerciſe any juriſdiction, or join in making any pretended rule or ordinances, for ſupporting any pretended privilege within the ſaid place, or for oppoſing the execution of any legal proceſs, *&c.* every perſon ſo offending, being convicted thereof, on indictment or information brought within ſix months after the offenſe, ſhall be guilty of felony and tranſported. *Ibid. ſect.* 2.

" And if any perſon wearing a maſk or diſguiſed habit, or having his face or body diſguiſed, ſhall, within the ſaid places, join in or abet any riot there, or ſhall in any diſguiſe knowingly oppoſe the execution of any legal proceſs, or aſſault or abuſe any perſon ſerving ſuch proceſs, every ſuch perſon being convicted ſhall ſuffer death. And every perſon who ſhall aſſiſt or conceal any ſuch diſguiſed perſon, being thereof convicted, ſhall be adjudged guilty of felony, and ſhall be tranſported." *Ibid. ſect.* 3.

" And every perſon who ſhall apprehend any one guilty of the offenſes aforeſaid, and proſecute him till convicted, ſhall receive for every ſuch offender 40 *l.* to be paid by the ſheriff of *Surry* without fee, in one month after ſuch conviction, and demand thereof made by tendering a certificate to the ſheriff of the judge before whom ſuch offender was convicted, certifying his conviction, and that he was taken by the perſon claiming the reward; and in caſe

caſe of diſpute touching the reward, the judge ſhall in the certificate direct the reward amongſt the parties, in ſuch ſhares as ſhall ſeem reaſonable; and if ſuch ſheriff ſhall die or be removed, the ſucceeding ſheriff ſhall pay it in one month; and if the ſheriff make default, he ſhall forfeit, to the perſon to whom ſuch money ſhall be due, double the ſum he ought to have paid, to be recovered with double coſts." *Ibid. ſect.* 4.

"And if any perſon ſhall be killed by ſuch offender in endeavouring to apprehend him, the executors, *&c.* of ſuch perſon ſo killed, (on certificate of the judge of aſſize, or the two next juſtices of peace) ſhall receive 40 *l.* from the ſheriff of the county where the fact was committed; and on failure of payment, ſuch ſheriff ſhall forfeit double the ſum, to be recovered with double coſts." *Ibid. ſect.* 5.

"And if any ſuch apprehender or proſecutor is guilty of any of the ſaid offenſes, not being in priſon for the ſame, and convicting two or more, he ſhall not only have the reward, but alſo be intitled to a pardon." *Ibid. ſect.* 8.

"And the charge of raiſing the *Poſſe Comitatus*, or other power, for enforcing the execution of this act, or the act of 8 & 9 *W.* 3. *c.* 27. ſhall be paid by the ſheriff." *Ibid. ſect.* 9.

"And nothing in this act ſhall repeal the ſaid act, or any law in force againſt pretended privileged places, or for ſuppreſſing riots, except in caſes wherein other proviſion is made by this act." *Stat.* 9 *Geo. chap.* 28.

The Stannaries. The courts of the *Stannaries* were inſtituted for the conveniency of tinners, by charter of *Edward* 1. *Stat.* 50 *Ed.* 3. (not printed) *Stat.* 16 *Char. chap.* 15. 4 *Inſt. c.* 45. that they might be encouraged in the making of tin, one of the ſtaple commodities of the kingdom, and therefore in *Cornwall* and *Devonſhire*, where the ore or mine, of which it is chiefly made, abounds, the workers herein are allowed the privilege of ſuing and being ſued in thoſe places. *Bac. Abr.* 652.

Tranſitory

Tranſitory actions between tinner and tinner, or worker and worker, though not concerning the ſtannaries, nor ariſing therein, if defendant be found within the ſtannaries, may be brought in theſe courts, or at common law. 4 *Inſt. chap.* 45. p. 231.

But if one party only be a tinner or worker, ſuch tranſitory actions which concern not the ſtannaries, nor ariſe therein, cannot be brought there; and in that caſe defendant, by the cuſtom and uſage of that court, may plead to the juriſdiction, and ought not to be arreſted going to ſwear it, or returning or carrying. 4 *Inſt. ibid.* 2 *Rol. Rep.* 379. But it was ſaid by chief juſtice *Ley*, that after the oath taken, they will for 3*d.* enter plaintiff a tinner. *Ibid.* 253.

The juriſdiction of the ſtannaries is only for tin matters, and where the perſons who ſue, or one of them, be a tinner. *Cro. Car.* 333. *pl.* 19. *Stat.* 16 *Car. c.* 15. *ſect.* 4.

They have no juriſdiction of any local action ariſing out of the ſtannaries. 4 *Inſt. ibid.*

Plaintiff muſt ſhew that he was a tinner, and that the court was held within the juriſdiction of the ſtannaries. 7 *Mod.* 103.

Miſtaking the perſon.

The ſheriff had proceſs againſt one *Adderley*, and he took one *Adderby*; if he were known by one name or the other, it is good; *aliter* not. *Mo.* 107. *pl.* 548.

He ought at his peril to take notice of the perſon, &c.

If the ſheriff executes a *Capias*, and there is no original to warrant it, he is excuſable; but he muſt take notice at his peril of the perſon and goods that he arreſts, for he is not to examine whether the original be ſued out or not: but if he arreſt *J. S.* inſtead of *J. N.* he does it without warrant. *Dalt.* 112.

Perſonating another.

Capias againſt *G.* and *E. B.* affirms himſelf to be *G.* and is taken, yet this ſhall not excuſe in falſe impriſonment; the ſame law of a *Commiſſion of Rebellion*. *Hardr.* 323.

And

And note, where there are two ſheriffs, the arreſt or neglect of one, is the arreſt or neglect of both. *Salk.* 152.

Who may not be arreſted. The King.

The perſon of the King is ſo ſacred, that no violent hands may in any caſe be laid upon him. *Stamp. de Prærog.* 42, 72, 73.

The Queen.

A Queen Regnant has the ſame privileges as a King. A Queen Conſort is free from arreſt, for every married woman in his majeſty's dominions (except a *Feme Covert*, ſeparate trader in *London*, 10 *Mod.* 6. See *Bac. Abr.* 688.) has that privilege; which privilege the King's wife retains even after the demiſe of the crown, ſo that a Queen Dowager is intitled thereto. 2 *Inſt.* 48. 3 *Inſt.* 30. *pl.* 19.

The King's ſervants.

No petition is to be received for protecting his majeſty's ſervants. By order of the houſe of lords 23 *Nov.* 1693.

Wiltſhire, under-ſheriff, was impriſoned by the lord chamberlain for arreſting Sir *George Haſtings*, ſervant to the King, upon a *Cap' Utlagat. Lit. Rep.* 65.

Court, He may well arreſt him, for it is at the ſuit of the King himſelf, and he is ſworn to ſerve it. And by all the judges of *England*, he who procured the commitment of the under-ſheriff ought to pay all the charges and expences. And it is adjudged in *Co. Rep.* 40. *pl.* 108. The King's ſervant is not ſo privileged from arreſts, but that the ſheriff ought to return his writ, unleſs he ſhews his privilege on the arreſt. *Kel. Rep.* 40. *pl.* 108.

Where notice ought to be to the lord chamberlain.

The court declared their opinion to be, that none of the King's ſervants in ordinary can be arreſted without notice firſt given to my lord chamberlain, who cannot privilege any perpetually, but in convenient time muſt either remove ſuch, or make them pay their debts; but if the bailiffs, without notice, do arreſt any ſuch, the meſſengers of my lord chamberlain cannot reſcue the priſoner by letter (the arreſt being lawful), nor by warrant, but the party is puniſhable for his contempt, for no man can know the King's ſervant by his face, but he muſt

muſt ſhew his privilege on the arreſt. *Keb. Rep.* 137. *pl.* 70. 2 *Keb. Rep.* 3. *pl.* 6. *Keb. Rep.* 842. *pl.* 33. 2 *Show. Rep.* 84. *pl.* 72. *T. Raym.* 152, 234.

They alſo conceived the warrant of my lord chamberlain to the meſſenger, to take all perſons that detain ſuch priſoner, is a reſcue and againſt law, and is to be only againſt the plaintiff that ſued; for the bailiffs had the King's warrant to arreſt, and had no notice before the arreſt that he was the King's ſervant. 2 *Keb. Rep.* 3. *pl.* 6. His warrant a reſcue.

Dixon had a debt due to him from *Killigrew*, a grand officer of the King's houſhold, and for that he could not arreſt him, he took out proceſs and outlawed him; and *Killigrew* hearing of it, cauſed the plaintiff to be impriſoned; and *Dixon* obtained an *Habeas Corpus* of the chief juſtice in the vacation, and an *Alias* and *Pluries*; and upon ſpeech with the King, the chief juſtice informed him in this manner (as the chief juſtice reported in open court), *viz. That his ſervants were free from arreſts, and therefore he ſhould not be deprived of them without his leave*; but this privilege is for the advantage of the King, but not for his ſervants. But notwithſtanding this reſolution, *Dixon* was arreſted again, and impriſoned, and now *Keiling* moved for a *Pluries Habeas Corpus*, and the court granted an *Habeas Corpus*, but not a *Pluries*, becauſe none was granted before in open court. *Raym.* 152.

A warden of the *Tower* claimed privilege as a King's ſervant, but denied. 2 *Keb. Rep.* 485.

[The following proceedings of the houſe of peers concerning the privilege of her majeſty's ſervants from arreſts, are extracted from the journals of that houſe in the time of Queen *Elizabeth*, collected by Sir *Simonds D'Ewes*, bart.]

Memorandum: Report was made unto the houſe by the lord *Zouch*, of one *William Hogan*, an ordinary ſervant of the Queen's majeſty, arreſted and impriſoned upon an execution by one *John Tolkerne*, ſince the beginning of the parliament. And a motion

tion was likewiſe made by his lordſhip to know the judgment and reſolution of the houſe in this point, whether any ordinary ſervant of her Majeſty (though he be none of the parliament) be not privileged and protected from arreſts during the time of parliament, by virtue of his ſaid ſervice to her Majeſty; in like ſort as the ſervants of the lords of the parliament, attending the ſaid lords their maſters, are privileged and freed for that time from any arreſts of their perſons: and withal, being arreſted upon execution, whether in this caſe he may by good order of this houſe be diſcharged: which motion and doubt the lord *Zouch* profeſſed that he did the rather propound, becauſe (though there were divers examples of former times, touching the ſervants of the lords of parliament) the like to this concerning one of the Queen's ſervants had not been (ſo far as was remembered) brought in queſtion heretofore. And therefore it pleaſed the lords to take knowledge of this motion, and to give order that *Tolkerne* ſhould be ſent for, at whoſe ſuit the arreſt was made; and withal, that ſuch precedents as the clerk of the parliament could ſhew, ſhould be looked out and made known to the houſe. *D'Ewes's Journ.* 603. *Edit.* 1708.

The clerk of the parliament was required to ſhew forth all ſuch precedents as he had found touching the arreſts of any perſons privileged by parliament, having received directions from the lords for that purpoſe, as is before recorded; of which ſort, out of the journal book remaining in his cuſtody, there were to be found only theſe four here under mentioned, and no more.

1. *Tueſday*, firſt *Dec.* in the 27th year of Queen *Elizabeth*, of *James Diggs*, ſervant to my lord's grace of *Canterbury*.

2. *Monday* 7th *Dec.* ſame year, of *Robert Finnies*, ſervant to the lord viſcount *Binden*.

3. *Item*, in the laſt parliament of 39 *Eliz.* 26th *Nov.* of *Edward Barſton*, ſervant to lord *Chandos*; and

and 8th *Dec.* of *John York*, the lord archbiſhop's ſervant.

4. *Item*, laſt day of *June*, 14th of the Queen, of the lord *Cromwell*.

Whereas upon complaint and declaration made to the lords ſpiritual and temporal, by *Henry* lord *Cromwell*, a lord of the parliament, that in a cauſe between one *James Tavernor* againſt the lord *Cromwell*, depending in the court of *Chancery*, in the abſence of the lord keeper of the great ſeal, at the ſuit of the ſaid *Tavernor*, the perſon of the ſaid lord *Cromwell* was, by the ſheriff of the county of *Norfolk*, attached by vritue of a writ of attachment proceeding out of the ſaid court of *Chancery*, contrary to the ancient privilege and immunity, time out of memory, unto the lords of parliament and peers of this Realm in ſuch caſe uſed and allowed, as on the behalf of the ſaid lord *Cromwell* was declared and affirmed, wherein the ſaid lord *Cromwell*, as a lord of parliament, prayed remedy.

For as much as upon deliberate examination of this caſe in the ſaid parliament-chamber, in the preſence of the judges and other of the Queen's Majeſty's learned counſel there attendant in parliament, and upon declaration of the opinions of the ſaid judges and learned counſel, there hath been no matter directly produced or declared, whereby it did appear, or ſeem to the ſaid lords of parliament there aſſembled, that by the common law or cuſtom of the realm, or by any ſtatute law, or by any precedent of the ſaid court of *Chancery*, it is warranted, that the perſon of any lord having place and voice in parliament, in the like caſe in the ſaid court of *Chancery*, before this time hath been attached; ſo as the awarding of the ſaid attachment at the ſuit of ſaid *Tavernor* againſt the ſaid lord *Cromwell*, for any thing as yet declared to the ſaid lords, appeareth to be derogatory, and prejudicial to the ancient privilege claimed to belong to the lords of this realm.

Therefore it is ordered, by the conſent of all the ſaid lords in parliament there aſſembled, that the perſon of the ſaid lord *Cromwell* be from henceforth diſcharged

diſcharged of and from the ſaid attachment. Provided nevertheleſs, and ſo is the mind of the ſaid lords in parliament, plainly by them with one aſſent declared, that if at any time during this parliament, there ſhall be ſhewed ſufficient matter, that by the Queen's prerogative, or by the common law or cuſtom of this realm, or by any ſtatute law or ſufficient precedents, the perſon of any of the lords of parliament in ſuch caſe, as this caſe of the lord *Cromwell* is, ought to be attached or attachable, then and from thenceforth it is by this order intended, that to take place which ſo ſhall be ſhewed and warranted, as aboveſaid; this order or any thing therein to the contrary notwithſtanding. *Ibid.* 203. *Dy.* 314, 315. *Prynne's 4th Part of Regiſter of Writs* 790. *Vol.* 3. *of Seld. Fol. Edit.* 1726. *p.* 1543.

Which ſaid precedents being accordingly preſented to the lord keeper, the ſame were preſently read, together with certain obſervations out of a book written by *Richard Crompton*, eſq; (intituled, The Authority and Juriſdiction of the Queen's Courts) concerning the proceedings of the houſe in the like caſe of *George Ferrers* gent. an ordinary ſervant to King *Henry* 8. about the 34th year of his reign.

A motion was made again by ſome of the lords, touching *William Hogan*, priſoner in the *Fleet*, that he might be ſent for out of the ſaid priſon, and brought into the houſe before the ſaid lords, to the end he might make relation of his cauſe, that thereupon ſuch order might be ſpeedily taken with him, as ſhould by the court be found meet, and agreeable to the privilege of the ſaid court. Upon which motion it was debated, by what courſe the ſaid *Hogan* ſhould be brought out of the *Fleet*, being then in execution, whether by warrant to be directed from the lords to the lord keeper, requiring him to grant forth a writ in her Majeſty's name for the bringing of the ſaid *Hogan* from thence, or by the immediate direction and order from the houſe to the gentleman uſher or ſerjeant at arms, without any ſuch writ. Which being put to the queſtion, by the

e lord keeper, it was reſolved and ordered, by the eneral conſent of the houſe, that it ſhould be done y immediate direction and order from the houſe, ithout any ſuch writ, as aforeſaid. And accor- ngly ordered, that the ſaid *William Hogan* ſhould e ſent for, and brought before the lords by the gen- eman uſher into the ſaid houſe of parliament. *id.*

Said *William Hogan* being brought from the *Fleet* to the houſe before the lords, and having made (as e was required to do) relation of his arreſt, and f the time, and parties that arreſted him; declaring hat he was arreſted by the under-ſheriff of the ounty of *Surry*, and others aſſiſting him, upon *Sa- rday* before the beginning of the parliament which began on the *Tueſday* following), and that was known to the ſaid under-ſheriff that he was er Majeſty's ordinary ſervant; and moreover, that e thought *Tolkerne* was not privy to his arreſt at hat time, contrary to the privilege of that court. Upon the offer, and petition of the ſaid *William Ho- an* himſelf, to pay the principal debt of 50 *l.* it as reſolved and ordered by the lords, that the ſaid *Villiam Hogan* ſhould enter into ſufficient (*a*) to bide the order and judgment of the earl of *Cumber- nd*, lord biſhop of *London*, and the lord *Zouch*, for ch ſatisfaction to be made of the debt of 50 *l.* and ny coſts and charges as by the ſaid lords ſhould be hought fit, (the bond to be taken to the ſaid lords) nd thereupon be diſcharged out of priſon and out f execution: and likewiſe that the warden of the *leet* ſhould be free from any trouble, damage or noleſtation, for diſcharge of the ſaid *William Hogan*. t was likewiſe ordered by the court, that the un- er-ſheriff, and any others that did arreſt or aſſiſt he arreſt of the ſaid *William Hogan*, ſhall be ſent or to appear before the lords in the houſe. *Ibid.* 05.

(*a*) So in the original.

The under-ſheriff of the county of *Surry*, that arreſted *William Hogan*, was brought into the houſe to anſwer for the ſame, and by order of the houſe committed to the priſon of the *Fleet*. *Ibid.* 606.

It was ordered by the houſe, upon the humble petition of *William Hauſe*, under-ſheriff of the county of *Surry*, that he ſhould be enlarged and ſet at liberty out of the priſon of the *Fleet*, whither he was lately committed for arreſting *William Hogan*, her Majeſty's ſervant. *Ibid.*

The lords were informed by the earl of *Worceſter* of an arreſt made of the perſon of *Robert Treſwell*, *Somerſet*, one of his Majeſty's heralds at arms in ordinary, at the ſuit of one *Margery Fitchet* of *London*, whereupon it was ordered by the court, that the ſerjeant at arms ſhould be ſent for the ſaid *Margaret Fitchet*, and for *William Smith* and *William Lane*, that made the arreſt, and ſhould bring them before the lords into the upper houſe, and that the ſaid ſerjeant ſhould alſo bring *Robert Treſwell* himſelf. *Ibid.* 608.

For more about the privilege of the King's ſervants, ſee *Phillipp's Regale Neceſſarium*.

Neither the ſervants of a Queen Conſort, or of a Queen Dowager, are privileged from an arreſt. *Keb.* 842. *pl.* 33. *Starkie*'s caſe.

The Royal Family, foreign princes, peers, and their ſervants.

It ſeems that none of the Royal Family are privileged from arreſts merely as ſuch, nor princes of the blood or peers of foreign ſtates, and conſequently none of their ſervants. See 7 *Co.* 15. *a. b.* 16. *a.* 2 *Inſt.* 48. 3 *Inſt.* 30. *pl.* 19.

Privilege. Ambaſſadors and their ſervants privileged from arreſts.

" All proceſs, whereby the perſon of any ambaſſador or public miniſter of any foreign prince or ſtate, or the domeſtic ſervants of any ſuch ambaſſador, *&c.* may be arreſted, or his goods diſtrained, ſhall be adjudged void." *Stat.* 7 *Ann. c.* 12. *ſect.* 3.

" The perſons ſuing forth ſuch proceſs, their attornies and ſolicitors, and the officers executing the ſame, being convicted thereof by the confeſſion of the party, or by the oath of one witneſs, before the

the lord chancellor and the chief juſtices, or any two of them, ſhall be deemed violators of the laws of nations, and ſhall ſuffer ſuch penalties and corporal puniſhment as they, or any two of them, ſhall judge fit." *Sect.* 4.

" No merchant or trader, within the deſcription of any of the ſtatutes of bankrupts, putting himſelf into the ſervice of any ambaſſador, *&c.* ſhall have any benefit by this act. And no perſon ſhall be proceeded againſt, as having arreſted the ſervant of an ambaſſador, *&c.* unleſs the name of ſuch ſervant be firſt regiſtered in the ſecretaries office, and tranſmitted to the ſheriffs of *London* and *Middleſex*; who muſt hang it in ſome public place in their office." *Sect.* 5. Traders not privileged. Servants to be regiſtered.

" The act to be taken as a public act. Judges, *&c.* to take notice of it, without pleading it ſpecially. Sheriffs, bailiffs, *&c.* concerned in the execution of proceſs, to regard it at their peril." *Sect.* 6.

The above act paſſed on the *Czar*'s ambaſſador being arreſted. See the preamble to the ſaid act, and 10 *Mod.* 4, 5.

Motion to ſet aſide an arreſt, and to vacate a bail-bond given by plaintiff, who was a domeſtic of the duke of *Holſtein*, reſident here, he having been regiſtered, *&c.* purſuant to the above ſtatute, granted. 1 *Mod.* 288.

Motion to diſcharge the defendant out of execution, as being an ambaſſador's ſervant, *viz.* his *Engliſh* ſecretary. And it was objected, he did not live in the houſe; and the words of the above act are, *domeſtick* ſervants. *But by the court:* The nature of his employment requires his attendance at the houſe, and it is not neceſſary he ſhould lie there. And the general words, " All writs and proceſſes ſhall be void," take in this caſe, and therefore the execution muſt be ſet aſide. 2 *Stra.* 737. 2 Lord *Raym.* 1524. Need not lie in the houſe.

Upon a motion to ſuperſede a proceſs againſt the defendant, as being in the ſervice of a foreign ambaſſador; the court held, that to be a privileged ſervant

vant within the act, it is not required that the party actually live in the ambaſſador's houſe. But neither is it enough, that the party be regiſtered in the ſecretary's office as a ſervant; but when he comes for the benefit of this act, he muſt ſhew the nature of his ſervice, that the court may judge whether he be a *domeſtick* ſervant, within the meaning of the act of parliament. In this caſe it was objected againſt the defendant, that he was a trader, and ſo expreſly excluded from privilege by the ſtatute: to which Mr. ſolicitor general, who was counſel for the defendant, anſwered, That by traders within this act, muſt be underſtood, ſuch as may have the benefit of the ſtatutes concerning bankrupts, which infants are not intitled to, as it was determined in one (*a*) *Whitlock*'s caſe: and that the defendant could prove he had exerciſed no trade ſince his full age. Lord *Raymond* aſked, whether there were not ſome other ingredients in that caſe of *Whitlock*, upon which the reſolution there turned; but his lordſhip ſaid he gave no opinion in that matter. *Fitz-Gib.* 200. *pl.* 12. 2 *Stra.* 797.

Muſt be a *domeſtick* ſervant, a *menial* one ſeems not to be ſufficient. An annuitant is not within the act.

Defendant moved to be diſcharged as *domeſtick* or *menial* ſervant (which were the words of his affidavit) of baron *Hopman*, envoy from the duke of *Mecklenbourg*, and obtained a rule *niſi*. Plaintiff ſhewed for cauſe, that defendant had an annuity of 200 *l.* a year, and that he was a juſtice for *Middleſex*, ſo that it was not likely he could act as the envoy's *domeſtick* ſervant; and inſiſted that the words of the envoy's certificate, produced by defendant, were *menial* ſervant only, which is not within the act, the words of the act being *domeſtick* ſervant. *By the court:* The word *menial* is not explained by our law, *domeſtick* ſervant are the words of the act, and it doth not appear that defendant was ſuch. A *menial* ſervant may be employed out of the houſe or houſehold affairs, a *domeſtick* in or about the houſe only. A perſon living as a clerk, is

Clerk no *domeſtic* ſervant.

(*a*) Lord *Raym.* 443. *Sel. Caſ. in Canc.* 46. 12 *Mod.* 243. *S. P. Atk. Rep.* 1765. *p.* 146. *pl.* 86.

no

o *domeſtick* ſervant. Defendant did not appear to ave received any wages. *Barnes's Notes* 264. *Pract. Reg. C. P.* 14.

Defendant moved to be diſcharged out of execu- A trader reſiding at his own houſe not within the act.
ion, being ſteward of the houſhold to baron *Bourk*, foreign envoy; and obtained a rule to ſhew cauſe, which was afterwards diſcharged, on hearing council n both ſides; it appearing that defendant was a rader, that he reſided at his own houſe in the *Old Palace Yard*, *Weſtminſter*, and that the envoy was at *Hanover* at the time of the arreſt. *Barnes* 271.

Defendant being arreſted at the plaintiff's ſuit, noved to be diſcharged out of cuſtody, upon affi- avit that he was a courier employed in the ſervice f Sir *Thomas Geraldino*, envoy from the King of *Spain*, and (during receſs from journies, wherein he was frequently employed by the envoy) did eat at is houſe among his other ſervants, and was paid wages by him. It was inſiſted for plaintiff, that Sir *Thomas Geraldino* was not a public miniſter with- n the act of parliament, but only an agent for the court of *Spain*, to treat with the *South Sea* com- pany: that admitting him to be a public miniſter, a courier or meſſenger, who is paid for each journey according to his deſert, and not a certain ſum for wages by the year, is not a *domeſtick* ſervant. It fully appeared, by affidavits produced on behalf of plaintiff, that defendant was a trader, and conſe- quently not entitled to the benefit of the act of par- liament. The rule to ſhew cauſe why defendant ſhould not be diſcharged out of cuſtody was ſet aſide. *Barnes* 272. *Rep. and Caſ. of Pract. C. P.* 134. *S. C. S. P.*

Defendant was ſecretary to the reſident from *Ve-* Muſt ſerve in the capacity hired.
nice, but yet was taken in execution. Accordingly, upon affidavit from the reſident that he was ſo, and that his name was entered in the duke of *Newcaſtle*'s office, though it was not tranſmitted over to the ſheriff of *Middleſex*, at the time he was arreſted, but a few days after; and upon affidavit that he offered to ſhew his teſtimonial to the officer, and that he really exerciſed the office, the court diſ-

Protection.

charged him, notice being given of the motion. Where a perſon does not execute the office, which he has his teſtimonial for, but only gets himſelf entered in the liſt to have the benefit of a protection, they will not ſuffer it. *Barnard. K. B.* 79.

On rule to ſhew cauſe why the defendant ſhould not be diſcharged out of cuſtody, for being ſervant to an ambaſſador; it was ſaid, that the words of the affidavit, upon which the rule was made, only were, that he was hired in quality of a *domeſtick* ſervant to the ambaſſador, and did what ſervice he required of him. But he objected, that it was not ſworn, that he actually ſerved the ambaſſador in the capacity he was hired in. And beſides, the defendant has ſtiled himſelf apothecary in the affidavit; and by an expreſs clauſe in the act which gives protection to ambaſſadors ſervants, no one is intitled to ſuch protection who is liable to an act of bankruptcy. The attorney general on the other ſide, ſaid, that by the defendant's ſtiling himſelf apothecary, it does not appear, that he was any thing more than a journeyman, and in ſuch caſe he would not be liable to become bankrupt: and as to the other objection, he ſubmitted it, that the affidavit was certain enough. But the court ſaid it was neceſſary, that the defendant ſhould have ſworn, that he actually ſerved in the capacity he was hired; and upon that diſcharged the rule. *Barnard. K. B.* 401.

The defendant was arreſted and held to ſpecial bail, and moved to be diſcharged, having a certificate from the count *De Broglio*, the *French* ambaſſador, of his being maſter of the horſe; it appeared the defendant was a trader, and ſuch a one as a commiſſion of bankruptcy might have iſſued againſt; the court diſcharged the rule to ſhew cauſe. *Rep. and Caſ. of Pract. C. P.* 65.

Defendant was protected by baron *Hoffman*, a public miniſter, and the protection was regiſtred in the ſheriffs office, according to the act of parliament. A *Capias ad reſpondend'* was delivered to the ſheriff of *Dorſetſhire*, who durſt not execute it, by reaſon of the protection, and the penalty in the act. Plaintiff

ſerved

erved the ſheriff with a treaſury rule to return the writ, which rule was diſcharged by the court. 2 *Barnes* 332.

The nobility of *England* are privileged from arreſts,

Peers of *England* and their ſervants.

1. As peers of the realm; with whom we ſhall ſpeak of biſhops and peereſſes.

2. Lords of parliament.

All peers, without any diſtinction as to degree or rank, are intitled to privilege, for they are equally obliged to attend the ſervice of the public; and the law intends them to be aſſiſting the King with their counſel for the common wealth, and to keep the realm in ſafety with their proweſs and valour; and are always ſuppoſed amenable, and to have ſufficient property to anſwer in ſuits and actions brought againſt them, and on theſe grounds, are not to be arreſted or moleſted in their perſons. 4 *Bac. Abr.* 228, 231. 2 Ld. *Raym.* 1247. 4 *Inſt.* 24. *Styl.* 222, 253. *Mo.* 767. *Vol.* 3. of *Selden's* works, *Fol. Edit.* 1726. *p.* 14, 78. *Dy.* 60. *a. in Marg. Mo.* 778. *pl.* 1080. *Noy* 102. *Stamf. Cl. Cr.* 38. (A.) *Hawk. Pl. Cr.* 59. *chap.* 22. *ſect.* 2. See 4 *Inſt.* 49. 9 *Co.* 49. *a. Ibid.* 68. *Jenk. Cent.* 107. *Ca.* 6. *Hob.* 61. 12 *Co.* 96. 10 *Co.* 78. *b.*

As peers of the realm.

The ſon and heir apparent of a nobleman, is not privileged from arreſts; but it ſeems that an infant peer is, his perſon being held ſacred. 2 *Inſt.* 48. 3 *Inſt.* 30. *pl.* 19.

A motion was made on the behalf of the lord *Banbury* for a *Superſedeas* to a *Latitat*, which was iſſued out of the court of *B. R.* againſt him, and on which he had been taken; and to induce the court to grant it, they offered to produce an exemplification of the judgment in the indictment in this court againſt my lord, and the letters patent of his creation, and an affidavit that my lord was the ſame perſon in the record of the judgment; and it was alſo pretended, that if my lord ſhould put in bail, he would be eſtopped to plead his peerage; but the court denied the motion, and the chief juſtice

ſaid they could not take notice that this *Charles Knollys* is earl of *Banbury*; that there was a difference between this caſe and the caſe of a peer that had ſat in the houſe of lords. If my lord had been ever ſummoned to parliament, and had a writ to ſhew, and there were no diſpute about the identity of the perſon, it would have been reaſonale to have granted a *ſuperſedeas*. 2 *Ld. Raym.* 1247. *Salk.* 512.

Biſhops peers.

Though it has been much * controverted whether biſhops were peers of the realm, yet it ſeems pretty well ſettled at this day that they are, and therefore no proceſs in a civil action is to be awarded againſt their bodies. *Vol.* 3. *Seld.* 1538, 1539, 1697, 1589.

A peereſs by birth is intitled to privilege; ſo of a peereſs by marriage, and that as well during the coverture as after; as a peereſs by marriage loſes her dignity by marrying a commoner, after ſuch marriage ſhe ſhall not be allowed privilege of peerage. 6 *Co.* 53. 2 *Inſt.* 50. *Co. Lit.* 16. By order of the houſe of Lords of 21 *Feb.* 1692. *Dy.* 79. *pl.* 51. 2 *Hawk. Pl. Cr. cap.* 44. *ſ.* 11. *p.* 423.

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A bill of *Middleſex* was iſſued out of *K. B.* by an attorney of the court, againſt the counteſs of *Huntingdon*, which was diſcharged by *ſuperſedeas*, without pleading; becauſe it appeared by the record that ſhe was a peereſs. *Ventr.* 298.

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The privilege of the houſe of † lords is, that no lord of parliament, ſitting the parliament, or within the uſual times of privilege, ſhall be impriſoned or reſtrained, without ſentence or order of the houſe, (unleſs for treaſon or felony, or for refuſing to give ſecurity for the peace.) By order of 18 *April* 1626. 4 *Inſt.* 25. *Prynne's 4th Part of Reg. of Writs* 701, 702. *Comb.* 49. As lords of parliament.

The privilege of parliament, according to the law of parliament, is of a very extenſive nature; but all that is here intended to be treated of, is only the taking notice of and pointing out ſuch caſes and reſolutions relative hereto, as are to be found in the books of law: not to determine concerning this privilege as ſettled by the rules and orders of each houſe, of which they themſelves are the ſole judges, though the King's courts incidentally take notice thereof, and are bound to determine in matters of privilege, when ſo directed by act of parliament. 4 *Bac. Abr.* 229. 4 *Inſt.* 50, 51. *Prynne's* 4 *Inſt.* 16. 13 *Co.* 63, 64. 2 *Ld. Raym.* 1111.

Lord *Coke* ſays of this law, *That it is to be inquired after by all, by many unknown*, and conſequently, *known but by few.* 4 *Inſt.* 15.

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All the menial ſervants of lords of parliament, and thoſe of their family, and alſo thoſe employed neceſſarily and properly about their eſtates as well as their perſons, are privileged. This freedom begins from the date of the writ of ſummons in the beginning of every parliament, and continues twenty days

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before and after every ſeſſion. *Ibid.* 28 *May* 1624. 2 *Show. Rep.* 84.

By an order 22 *June* 1715, it was reſolved, That every peer ſhould, upon his honour, certify to the houſe, that the perſons protected were within the privilege of the houſe; and ſhould by letter acquaint the party, arreſting ſuch privileged perſon, with the ſame.

By an order 24 *Jan.* 1696, in the houſe of lords, it was reſolved, That no common attorney or ſolicitor, though employed by any peer, ſhould have the privilege of this houſe.

An attorney was taken in execution upon a *capias ad ſatisfaciendum*, about two years ago; but upon a letter under the hand and ſeal of the lord *Say and Seal*, the ſheriff diſcharged him as ſteward to his lordſhip; a rule was obtained at the ſide-bar for the return of the writ; and now, on motion in court to diſcharge this rule, it was urged in behalf of the ſheriff, that this privilege belonged only to the peer, and not to the party, and was not returnable to the proceſs; and that therefore the court ought not to inſiſt upon a return, as the ſheriff could not juſtify the detention of the defendant, but under peril of bringing himſelf and the plaintiff under the cenſure of the houſe of peers: but, on conſideration of the above mentioned orders, and on conſidering the nature of this caſe, that the plaintiff was within the ordinary juſtice of the court intitled to a return of his writ; that without ſuch return he might be debarred from any further execution; but principally from the great inconveniency that might ariſe by allowing attornies, who are officers to the courts in which they reſpectively practiſe, and therefore amenable to thoſe courts, this kind of privilege; the court gave the plaintiff liberty to proceed againſt the ſheriff, but gave him time till next term to make his return. 4 *Bac. Abr.* 230. 2 *Stra.* 1065.

J. S. brought an action for rent againſt *H.* who pleaded that he was tenant and ſervant to Lord *Moon*, and prayed his writ of privilege might be allowed; the plaintiff demurred. It was argued, that the

matter

matter of plea was againſt the common and ſtatute law; but by *Roll* chief juſtice you ought not to argue generally againſt the privilege of parliament; every court hath its privilege; I conceive a writ of privilege belongs to a parliament man, ſo far as to protect his lands and eſtate, and you have admitted his privilege by your demurrer. *Stil.* 139, 167. Order, 8 *May* 1628. Sir *William Jones* 155.

Defendant, after a general imparlance, pleaded, that he was a ſervant to a peer, *viz.* the earl of *Pembroke*; and by *North* chief juſtice it is not receivable, for it is the privilege of the maſter, and not the ſervant: but the defendant ought to ſue his writ of privilege, for perhaps his maſter will not protect him; and if he will not, he is then left to anſwer. Like to the caſe of a counſellor, where it is the privilege of the client that he ſhall not be compelled to diſcover the ſecrets of the client; but if the client be willing, the court will compel the counſel to diſcover what he knows, which ſerjeant *Maynard* ſaid was his father's caſe before the Lord *Cecil*, in the court of *Wards*. *North* ſaid, as it was a matter of great conſequence, he would adviſe with the Lord Chancellor and the reſt of the judges, what uſed to be done in ſuch caſes. Afterwards it was moved again, and *North* ſaid it was moved in the houſe of lords, and that they had left it to the judges to do according to law; and therefore the plea was rejected. 4 *Bac. Abr.* 230. See *Bendl.* 105. and 3 *Mod.* 1478.

Peers of *Scotland*, and their ſervants.

The peers of *Scotland* had no privileges in this kingdom, before the union; but now, by the 23d article of the union, *viz.* 5 *Ann. c.* 8. "The ſixteen peers ſhall have all the privileges of the peers of parliament of *Great Britain*; alſo all the reſt of the peers of *Scotland* ſhall have all the privileges of the peerage of *England*, except only that of ſitting and voting in parliament, and the privileges depending thereupon. See the act. See *Peere Will.* 583. 9 *Co.* 117.

The Lord *Mordington*, who was a *Scotch* peer, but not one of thoſe who ſat in parliament, being arreſted, moved the court of *Common Pleas* to be diſcharged, as

as being intitled by the act of union to all the privileges of a peer of *Great Britain*, except a ſeat in parliament; and prayed an attachment againſt the bailiff, upon which a rule was made to ſhew cauſe.

And thereupon the bailiff made an affidavit, that when he arreſted the ſaid lord, he was ſo mean in his apparel, as having a worn-out ſuit of cloaths and a dirty ſhirt on, and but ſix-pence in his pocket, he could not ſuppoſe him to be a peer of *Great Britain*; and therefore through inadvertency arreſted him.

The court diſcharged the lord, and made the bailiff aſk pardon. *Forteſc. Rep.* 165.

Peers of *Ireland*.

A lord of *Ireland* hath not any other privilege in this kingdom than a common perſon. 2 *Inſt.* 48. 3 *Inſt.* 30.

Members of parliament, and of the convocation, and their ſervants.

Privilege of parliament is only a temporary immunity, which our Kings grant to the members of parliament and their neceſſary attendants, during parliamentary aſſemblies, againſt arreſts and impriſonments of their perſons, cuſtomarily and humbly demanded by the ſpeaker of the *Commons* houſe from all our Kings, at the beginning of every parliament, when preſented by the houſe, in their own and the members behalf, and then freely and graciouſly granted to them by the King, as a matter of cuſtom and antient right. *Prynne's 4th Part of Regiſter of Writs* 624.

Mr. *Onſlow*, who was elected ſpeaker in 1566, neglected, on his being preſented to Queen *Elizabeth*, to demand this freedom from arreſts; and it was reſolved that ſuch demand was not neceſſary, and the privilege ſubſiſted notwithſtanding. *D'Ewes's Journ.* 122. *Sir Robert Atkins's Treatiſe of the Power of Parliament* 40.

For the proceedings of the houſe of commons, touching the privilege of their members, ſee the caſe of *Francis Neale*, eſq; one of the burgeſſes for the borough of *Grantham*, in the county of *Lincoln*, who was arreſted on a *Sunday* upon an execution; *D'Ewes's Journal* 518. and of ——— *Gardiner*, a burgeſs of the houſe of *commons*, a priſoner in the *Fleet*, who was reſtored to the houſe upon condition that upon prorogation,

gation, or diſſolution of the then ſeſſion of parliament, he might be a priſoner again. *Ibid.* 123.

Aſſiſtants, officers of both houſes of parliament, ho repair to parliament by the King's writ of ſumons, or upon legal elections, returns, and contially attend therein to diſcharge their duties during e whole ſeſſions of parliament, till its diſſolution, d that during their ſtay, coming, and return from to their homes. *Prynne's 4th Part of Reg. of Writs* 90. Alſo the ſerjeants at arms, and door-keepers, erks, and ſuch like. *Cromp. Juriſdict. of Courts* 1. Not the wives, children, kinſmen, ſtewards courts, feed counſellors, and attornies. *Noy's Rep.* 8. See order of the houſe of commons of *Thurſday*, 6 *July* 1663. Solicitors, proctors, ſcriveners, facors, phyſicians, apothecaries, goldſmiths, mercers, aberdaſhers, butchers, poulterers, vintners, ſadlers, aylors, ſhoe-makers, carpenters, or other tradeſmen, elating to members, or officers who are not *bonâ fide* really) their menial ſervants, actually coming with, nd attending upon them as their neceſſary ſervants, uring the parliament's ſitting, without fraud or coluſion. *Prynne's 4th Part of Reg. of Writs* 692. *D'Ewe's Journal* 83, 84, 85, 249, 629. *Freeholder's Grand Inqueſt* 54, 55. *Prynne's Plea for the Lords* 409. *Elſyng's Parliament* 199, 200. 4 *Prynne's Reg. of Writs* 798. See the orders of the houſe of commons of *Thurſday* 15 *Nov.* 1660, of *Monday* 25 *Nov.* 1661, (this order was revived 18 *Feb.* 1662, and 9 *Apr.* 1670), of *Thurſday* 28 *Nov.* 1661, (revived 9 *Apr.* and 9 *Dec.* 1670), of *Saturday* 28 *March* 1663, of *Thurſday* 20 *Decem.* 1666. See *D'Ewe's Journal* 249, 254, 258, 373.

A member of parliament ſhall have privilege of parliament, not only for his ſervants, but for his horſes, *&c.* or other goods diſtrainable. 4 *Inſt.* 24. Parliamentary privilege extends to horſes, *&c.*

Only menial ſervants, or one who attended on the perſon of a knight or burgeſs of parliament, is free from arreſt. *March* 93. *pl.* 157. Order of the houſe of commons of 20 *Nov.* 1621. Not bailiffs, carters, ſhepherds, ſtewards, grooms, or any other menial Menial ſervants only privileged.

menial ſervants in their country houſes, who attend not daily on their perſons, but are otherwiſe employed; nor yet all their menial ſervants who come and ſtay with them at their lodgings, unleſs they be neceſſary attendants, and convenient for their qualities: hence it hath been queſtioned, whether noblemen's, judges officers, cooks, butlers, grooms, who attend not on them in the parliament houſe or courts of juſtice, (as their gentlemen, ſecretaries, clerks, pages, and coachmen do) ſhould have any privilege? But becauſe ſuch honourable perſons of quality cannot conveniently or honourably reſort to parliament or terms, without cooks to dreſs their meat for their neceſſary repaſts, and butlers, and grooms for their horſes, upon that account have been allowed privilege; yea the cook of the *Temple* was allowed his privilege, 28 *H.* 8. when Sir *Thomas Audley* was ſpeaker, becauſe he dreſſed his meat for his table as ſpeaker: but I conceive the cooks of the inns of court or chancery, who dreſs their public commons in the hall, ſhall not have privilege of parliament, although the ſpeaker, or ſome members of either houſe eat their commons in the hall, which theſe cooks dreſs for them, becauſe they are not particular menial ſervants, but the whole ſociety's, upon which ſcore they dreſs their commons, elſe every other tavern, cook, victualler in and about *Weſtminſter*, who dreſs meat for the members, and thoſe that lodge them, ſhould have privilege of parliament; yea, every waterman, hackney-coachman, ſedanman, that row or carry them to and from the parliament, though not their menial ſervants, who never had, nor ought to have privilege. *Prynne's 4th Part of Reg. of Writs* 692, 693. *Bro. Abr. tit. Privilege, fol.* 152. *b. pl.* 6. 153. *b. pl.* 16. 154. *b. pl.* 42. *Fitz. Abr. tit. Privilege, fol.* 15. *b. pl.* 20. Mr. *John Doderidge's Preface before the Antiquity of Parliaments of England. Holinſhead's Chronicle, vol.* 3. *p.* 1084. *Crompton's Juriſdiction of Courts, fol.* 10. *b. Prynne's Plea for the Lords* 405.

In debt, defendant pleads he was ſervant to a member of parliament, and *therefore ought not to be taken*

ken or arreſted: Plaintiff prays judgment, and *be-uſe the barons are of opinion there is ſuch a privilege, at the great men, &c. and their ſervants ought not be taken, or arreſted; but that there does not appear y privilege that they ought not to be impleaded, there-re he muſt anſwer over.* Mod. 146. In 4th Part Prynne's Regiſter of Writs 757. is the Record at rge.

By *Dyer*, if a man be condemned in debt or treſ-ſs, and is choſen one of the burgeſſes or knights of rliament, and after is taken in execution, he can-ot have the privilege of parliament; and ſo it was eld by the ſages of the law in the caſe of one *Fer-rs*, in the time of *Henry* VIII. and though the pri-ilege at this time was allowed him, it was unjuſt. *Mo.* 57. *pl.* 163. *Dal.* 58. *pl.* 7. *Jenk. Cent.* 118. *a.* 35. See 4 *Prynne Reg. of Writs* 780.

Thomas Fitzherbert, being elected a burgeſs of the rliament, two hours after his election, and before e return of the writ to the ſheriff, with the inden-ure of his election, the ſaid ſheriff arreſted him pon a *capias utlagatum*, in an outlawry, after judg-ent, at the Queen's ſuit, and then his indenture as returned to the ſheriff. Upon all which mat-ers there grew two queſtions; firſt, Whether the id Mr. *Fitzherbert* were a member of the houſe? nd ſecondly, admitting, yet, Whether he ought to ave privilege? Which ſaid matters having been uch debated, received now the judgment of the ouſe, which was, That *Thomas Fitzherbert* was by is election a member thereof, yet that he ought not o have privilege in three reſpects: Firſt, becauſe he as taken in execution before the return of the in-enture of his election. Secondly, becauſe he had een outlawed at the Queen's ſuit, and was now ta-en in execution for her Majeſty's debt. Thirdly, nd laſtly, in regard that he was ſo taken by the heriff, neither *during the ſeſſion of parliament*, nor *in ing* or *returning*. *D'Ewe's Journal* 518. *Mo.* 40. *pl.* 461. *Prynne's 4th Part of Reg. of Writs* 46.

In

In the above caſe, as reported by Mr. ſerjeant *Moore*, *Cook* ſpeaker cited the caſe of *Thorpe* ſpeaker, *4th Part of Prynne's Reg. of Writs* 678. who was in the time of adjournment taken in execution at the ſuit of *York*, and reſolved on the meeting of parliament, that the ſpeaker ſhould not have his privilege; but they elected another ſpeaker. *Mo.* 340. *pl.* 461. *Prynne's Plea for the Lords* 397, 398. *Exact Abridgment of Records in the Tower* 651. *Elſyng* 194, 195, 196.

Divers perſons outlawed, as well before judgment as after, were choſen knights and burgeſſes of the parliament, held in the 35th year of Queen *Elizabeth*; and the queſtion being put, Whether ſuch perſons ought to be knights and burgeſſes of parliament or not? All the judges held that they ought not, and ſuch outlawed perſons might be arreſted by *capias utlagatum*, notwithſtanding privilege of parliament; and thereupon the Queen commanded, that no ſuch perſons ſhould be ſuffered in the parliament houſe. *Ander.* 293. *Ca.* 301.

"No privilege of parliament ſhall be allowed to any perſon whatſoever, againſt whom any proſecution or proceeding ſhall be commenced or had, for keeping of any public or common gaming-houſe, or any houſe, room, or place, for playing at any game prohibited by this or any other act now in being, againſt exceſſive or deceitful gaming." 18 *Geo.* 2. *c.* 34. *ſect.* 7.

No member of the houſe of commons, acting as a public officer, hath any privilege of parliament, touching any matter done in execution of his office. By order of the houſe of *Monday* 27 *Nov.* 1699. ſtat. 2 & 3 *Ann. c.* 18. *ſect.* 1.

No co-partner in any trade or undertaking is intitled to privilege in reſpect to any matter relating to ſuch co-partnerſhip. By order of *Friday* 9 *April* 1742.

Privilege of parliament doth not extend to high treaſon, felony, breach of the peace, or ſurety of the peace. 4 *Inſt.* 25. *Prynne's 4th Part of Reg. of Writs* 681.

1, 700, 702 *to* 716, 731, 737, 813, 814, 1202, 03, *&c. Comb.* 49.

" Foraſmuch as the prelates and clergy of the lm of *England*, called to the convocation, and their vants and familiars that come with them to ſuch nvocation, oftentimes and commonly be arreſted, leſted, and inquieted; our ſaid Lord the King, ling graciouſly in this behalf to provide for the urity and quietneſs of the ſaid prelates and clergy, the ſupplication of the ſame prelates and clergy, by the aſſent of the great men and commons reſaid, hath ordained and ſtatuted, that all the gy from henceforth to be called to the convocan by the King's writ, and their ſervants and faiars, ſhall for ever hereafter fully uſe and enjoy h liberty or defence in coming, tarrying, and urning, as the great men and commonalty of realm of *England*, called or to be called to the g's parliament, do enjoy, and were wont to enjoy, n time to come ought to enjoy." Stat. 8 *Hen.* 6. 1. *Eq. Caſ. Abr.* 349. (A) *pl.* 1. 3 *Chanc.* 22. *fol. edit.* 1736. *Prynne's 4th Part of Reg. Writs.* 644.

For the privilege of *members of the univerſities*, ſee The Univerſities," under head, " Privilege of ce."

The judges, their neceſſary ſervants, goods and tels, ſhall not be arreſted or taken, but in caſe reaſon or felony. *Cromp. Juriſdict. of Courts* 11. *id.* 31. Judges, their clerks and ſervants.

t ſeems that judges clerks may be arreſted, but you muſt proceed againſt them by original. *Ld. m.* 399. *Pract. Reg. C. P.* 380.

The lord mayor of the city of *London* is privileged n all actions during his mayoralty, in regard of office, except it be for felony or treaſon, or acs which concern freehold; this is, that he may be hindered in the government of the city, which g the metropolis of the nation, is of higher conment, in reſpect of the public, than any man's icular intereſt. 2 *Lil. Abr.* 456. (C) The lord mayor of *London*.

Clergymen.

" Becauſe that complaint is made to our Lord the King, by the clergy of his realm of *England*, that as well divers prieſts bearing the ſweet body of our Lord *Jeſus Chriſt* to ſick people, and their clerks with them, as otherwiſe divers other perſons of holy church, whiles they attend to divine ſervice in churches, church-yards, and other places dedicated to God, [ſee this head under " Privilege of Place," p. .] be ſundry times taken and arreſted by authority royal, and commandment of other temporal lords, in offence of God, and of the liberties of the holy church, and alſo in diſturbance of divine ſervices aforeſaid: the ſame our Lord the King, who would be ſore diſpleaſed if any did in ſuch manner, will and granteth, and defendeth upon his grievous forfeiture, that none do the ſame from henceforth, ſo that colluſion or feigned cauſe be not found in any of the ſaid perſons of holy church in this behalf." Stat. 50 *Edw.* 3. *c.* 5.

" Becauſe that prelates do complain themſelves, that as well beneficed people of holy church, as others, be arreſted and drawn out, as well of cathedral churches, as of other churches and their church-yards, and ſome times whiles they be intended to divine ſervices, and alſo in other places, although they be bearing the body of our Lord *Jeſus Chriſt* to ſick perſons, and ſo arreſted and drawn out, be bound and brought to priſon againſt the liberty of holy church; it is ordained, that if any miniſter of the King or other, do arreſt any perſon of holy church by ſuch manner, and thereof be duly convict, he ſhall have impriſonment, and then be ranſomed at the King's will, and make gree to the parties for arreſted: provided that ſaid people of holy church ſhall not hold themſelves within the churches by fraud or colluſion." Stat. 1 *Rich.* 2. *c.* 15.

And *Coke* ſaith, that he ſaw a report in the time of Queen *Mary*, upon the aforeſaid ſtatutes, where it was held, that they are but an affirmance of the common law, and in maintenance of the liberties of holy church, as appears by the preamble of the ſaid ſtatutes; and that *going*, *returning*, and *ſtaying*, celebra-

elebrate divine ſervice, the prieſt ought not to be rreſted, nor any who aid in it. 12 *Co.* 99. *Gib-n's Codex* 10, *note.* (X) *edit.* 1761. *Watſon's Cler-man's Law, chap.* 34. *p.* 344. *Folio edit.* 1747.

And if an arreſt be made contrary to the ſaid ſta-utes, and the perſon arreſting doth preſently diſ-harge the perſon arreſted, upon pretence of igno-ance, *&c.* this will not excuſe the contempt in aking the arreſt. *Cro. Char.* 602.

And it is to be noted, that the aforeſaid ſtatutes xtend both to prieſts and laymen. 2 *Brownl. Rep.* 01. 2 *Bulſtr.* 72. *Cro. Jam.* 321. However, ſuch undue arreſt be made, the arreſt be good; ſo at if a reſcous be made, and thereby any perſon illed, the killing is murder. 2 *Bulſtr.* 72. And ote, that one Dr. *B.* being arreſted and taken in xecution upon a *Sunday*, in the church-yard or orch, in coming from divine ſervice *, and it ap-earing to the court that the ſaid *B.* had abſconded me time before, the court would not diſcharge him om execution, nor puniſh the bailiffs; but had he ot ſo abſconded, they then would have puniſhed e contempt in the bailiffs. 2 *Keb.* 777. *pl.* 1.

It ſeems agreed, that the privilege of the court of *ommon Pleas*, which ſerjeants claim for themſelves, eir clerks and ſervants, extends only to inferior urts, not to the courts in *Weſtminſter hall*; and at they may be ſued in any of theſe, becauſe they e not confined to that court alone, but may prac-ſe in any other court. *Cro. Car.* 84, 85. 3 *Keb.* 24. *pl.* 23. 2 *Lev.* 129. *Freem.* 389. 2 *Mod.*

Serjeants at law, their clerks and ſervants.

* It is obſervable, that by this caſe, [if *Keble* has re-orted truly, who was a bad reporter, though a good re-ſtet, *Forteſc. Rep.* 162.] that a clergyman was arreſted *on Sunday in the church-yard, and coming from divine ſervice*, hich ſeems ſomewhat extraordinary, ſince an arreſt on a *nday*, whether of a prieſt or layman, is void by law. See *Char.* 2. *chap.* 7. *ſect.* 6. under head, "Privilege of ime." And arreſting in a church-yard, or coming from urch, ſubjects the offender to the action of the party rreſted. See the above acts of *Edward* the third and *ichard* the ſecond, and 2 *Mod. Rep.* 162, 165.

296. *Ld. Raym.* 399. *See* 4 *Bac. Abr.* 221. *North's Life of Lord Keeper Guildford* 69, 152.

Counſellors at law.

We do not find that gentlemen at the bar are privileged from being arreſted, but we have known ſeveral inſtances in which they have been held to bail, and never any queſtion was made of the legality of ſuch proceeding; and, we preſume, advantage would have been taken of an irregularity (to term it no worſe) of ſo heinous a nature, could there have been found the leaſt colour or pretence to ſupport the neceſſary allegations on ſuch an application.

Officers of the courts of juſtice, their clerks and ſervants.

The officers, miniſters, and clerks of the courts in *Weſtminſter hall*, are allowed particular privileges in reſpect of their neceſſary attendance on thoſe courts; they are regularly to ſue and be ſued in the courts they reſpectively belong to, and cannot, except in certain caſes, be impleaded elſewhere; which privilege ariſes from a ſuppoſition of law, that the buſineſs of the court, or their clients cauſes, would ſuffer by their being drawn into any other court than that in which their perſonal attendance is required. 2 *Inſt.* 551. 4 *Inſt.* 71, 72. *Vaugh.* 154. *Dy.* 377. *a. pl.* 30. *Cromp. Juriſdict. of Courts* 11. *Gilb. Hiſt. C. P.* 209, 212. *Bac. Abr.* 5. 4 *Bac. Abr.* 218.

Clerk.

A clerk of the court ought not to be arreſted for any thing which is not criminal, becauſe he is ſuppoſed to be always preſent in court, and muſt anſwer the plaintiff there; and therefore he that does arreſt him is puniſhable by the court, and therefore ſuch arreſt is accounted vexatious, which the law warrants not. *Lil. Abr.* 115. (C) *Palm.* 403.

Lord Chancellor, and officers in *Chancery*.

The right of being exempted and freed from arreſts by proceſs of other courts, belongs to Lord Chancellor or Keeper, to all the maſters, *Cromp. Juriſdict. of Courts* 48. *b. Bohun's Curſus Cancellariæ* 495. *edit.* 1723. *Regiſters. Skin.* 521. Curſitors, miniſters, officers, and known clerks of the court of *Chancery*, and to the menial ſervants of the Chancellor or Keeper, and of the miniſters and officers. Order of *Chancery* of *Tueſday* 22 *Dec.* 5 *Car.* 1629. *Pract. Reg. in Chancery* 284. *Introduct. to Pract.*

Alma

lmæ Curiæ Cancellariæ [*Practice of the High Court Chancery*] 31, 32. *Harriſon's Chancery Practiſer* o. *Edit.* 1757. *Bohun's Curſus Cancellariæ Courſe of the Chancery*] *chap.* 18. *p.* 490. See *y.* 287. *a. pl.* 48.

One of the clerks of the *Chancery* was ſued in the urt of *Common Pleas* in an action of debt, and oceſs continued until the *Exigent*; and the defen- nt, who was the clerk, did ſue out a *Superſe- as quia improvide*, directed to the ſheriff; and af- rwards he brought his writ of privilege directed to e juſtices there; reciting his privilege in the court *Chancery*, and required the juſtices to ſurceaſe; d it was well debated, whether he ſhould have his ivilege or not; and at laſt the privilege was diſal- wed, and the *Chancery* clerk forced to anſwer; for e court was lawfully ſeiſed of the plea by the act the defendant himſelf, for in as much as he did e out the *Superſedeas quia improvide*, he did affirm e juriſdiction of the court; for every *Superſedeas ia improvide* reciteth an appearance in court of the fendant, by his attorney, and ſhews his name, hereby it appears to be merely his own fault. See ix clerk's privilege pleaded in the *Exchequer*, *Hard.* 6. *pl.* 8. *Cromp. Juriſdiction of Courts* 188. *b.* Clerk in *Chancery.*

But if the defendant had not ſued out the *Super- eas* to the *Exigent*, notwithſtanding the *Exigent* d gone forth, yet his privilege had been allowed; d thereupon divers precedents were produced to the court.

And it was then ſaid, that after the writ of pri- ege comes to the juſtices, they ought to make to e ſheriff a ſpecial *Superſedeas* to the outlawry, re- ing the writ of privilege. *Dy.* 33. *b. pl.* 18. . 753. *pl.* 1038. See *Hardr.* 188, 189. *Andr.* . ſee the privilege of an uſher of the *Chancery* aded in the *Exchequer*. *Hard.* 117. *pl.* 2.

Chancery ſolicitors ſeem no more intitled to the vilege of being free from arreſts than "counſel- s at law;" and as what has been ſaid under that ad is equally applicable to this, I refer the reader ereto. *Chancery* ſolici- tors.

In joint actions no privilege.

The privilege which the court indulges their officers with, is reſtrained to the ſuits only, which they bring in their own right; for if they ſue or are ſued as executors or adminiſtrators, they then repreſent common perſons, who have not that privilege; ſo that when an attorney is ſued as executor or adminiſtrator, he may be impleaded in another court; for he is ſued as in another's right, *viz.* in right of his teſtator, and his perſonal privilege is not applicable to him in any other relation, than as he is an attorney of the court. 2 *Lil. Abr.* 456. (E) *Gilb. Hiſt. C. P.* 211. 4 *Bac. Abr.* 5. 2 *Rol. Abr.* 275. (H.) *pl.* 2, 3. *Hob.* 177. *Latch* 199. *Brownl.* 37, 47. 12 *Mod.* 316. Lord *Raym.* 533. *Salk.* 1. *pl.* 4, 7. *pl.* 18. 2 *Sid.* 157. *Dy.* 24. *pl.* 150. *Marg. Sav.* 20. *pl.* 49. ſee 39. *pl.* 88. For the ſame reaſons, the wife of a privileged perſon, if ſhe be arreſted, ought not to claim the privilege of the court, not to put in bail to the action as her husband may, if he be arreſted; but her husband muſt put in bail for her; and for want thereof ſhe is to be committed to priſon. 2 *Lil. Abr.* 457. (I.) *Noy Rep.* 68. 17 *Vin. Abr.* 517. (E) *pl.* 2. *Vaugh.* 299. *Godb.* 10. *pl.* 13. *Dyer* 377. *pl.* 30. *Bac. Abr.* 191.

Attorney ſued as bail not privileged.

An attorney ſued as bail has no privilege. *Rep. and Caſ. Pract. C. P.* 64. *Keb. Rep.* 735. *pl.* 16.

Privilege takes away privilege.

So if an officer of one court ſues an officer of another court, the defendant ſhall not plead his privilege; for the attendance of the plaintiff is as neceſſary in his court, as the defendant's in his; and therefore the cauſe is legally attached in the court where the plaintiff is an officer. *Gilb. Hiſt. C. P.* 211. 4 *Bac. Abr.* 5. *Godb.* 81. *pl.* 95. *Brownl.* 37. See *Hetl.* 29. *Lit. Rep.* 304. 2 *Stra.* 8[illegible] 1141. *Suppl. to Barnes* 7. 2 *Barnes* 34, 35. *Barnard. K. B.* 182.

No privilege in joint actions.

So if a privileged perſon brings a joint action with others, he loſes his privilege in this caſe, because the others are not officers of the court, nor intitled to the attachment, which the court grants to the

own miniſters. *Gilb. Hiſt.* 212. *Bac. Abr.* 5, 191. 4 *Bac. Abr.* 223.

So if an action be brought againſt him and others, he ſhall not have his privilege, for he would then deſtroy the plaintiff's action; for the plaintiff muſt ſue the others by original writ, and him by a petition to the juſtices; but this is to be underſtood where the action is joint and cannot be ſevered without doing an injury to the plaintiff, the officer ſhall have his privilege. *Gilb. Hiſt.* 212. *Bac. Abr.* 5, 191. 4 *Bac. Abr.* 223. *Dy.* 377. *pl.* 30. *in Marg.* 2 *Rol. Abr.* 274. (G) *pl.* 1, 2. 2 *Lev.* 129. *Ventr.* 288, 289. 3 *Salk.* 282. *pl.* 6. *Comb.* 12. Denied for ſome reaſon in *Chancery* to officers of the *Exchequer. Vern.* 246. *Ca.* 239. *Eq. Caſ. Abr.* 349. (A) *pl.* 3.

But this matter came fully to be conſidered in a caſe where treſpaſs was brought in the *King's Bench* againſt an attorney and another perſon, the attorney pleaded his privilege; as an attorney of the *Common Pleas*, and concluded, *That he does not preſume the court will take cognizance, &c.* and on demurrer, though it was admitted that the nature of the action was ſeveral, yet the court, on conſideration of the above cited caſes, held, that the rule was general, and that the plaintiff was not bound to bring ſeparate actions; and thereupon awarded an *anſwer over.* 4 *Bac. Abr.* 223.

If an attorney of the *Common Pleas* be in *cuſtody of the marſhal*, for want of bail at the ſuit of *A.* he may plead his privilege; for though he be taken upon bill of *Middleſex*, or *Latitat*, and in a common perſon's caſe, if he were brought in by ſuch proceſs, he is to anſwer to the plaintiff's demand againſt him by bill, and not to the proceſs that brought him; yet ſince *Actus Legis Nemini facit injuriam*, ſuch fictitious treſpaſs to bring the party to appear, ſhall never ouſt the attorney of his real privilege. *Gilb. Hiſt.* 213. *Bac.* as above. Lord *Raym.* 93. 2 *Rol. Abr.* 275. *pl.* 6.

But if he be in *the cuſtody of the marſhal*, at the ſuit of *A.* and *B.* declare againſt him in *cuſtody of*

the marſhal, he ſhall not plead his privilege againſt *B.* becauſe *B.* declares collaterally, as he is in priſon at the ſuit of *A.* and as to *B.* he is truly in *the cuſtody of the marſhal*; for being once ouſted of his privilege at the ſuit of *A.* he can no longer attend as an attorney in the other court, but is fixed in the *King's Bench*, and therefore cannot, by the ſuppoſition of the neceſſity of his attendance, ouſt the plaintiff of his action. 2 *Rol. Abr.* 275. *pl.* 7. Lord *Raym.* 135. *Salk.* 1. *pl.* 3. 5 *Mod.* 310. See 2 *Bulſtr.* 207.

Privilege takes away privilege.

An officer ſhall not have his privilege againſt the King; for as the executive power is lodged in the King, it would be unreaſonable that his court, which gives relief to private perſons, ſhould protect any ſubject from being brought to juſtice for offending againſt the laws, which concern the whole commonwealth. *Bac. Abr.* 5. 4 *Bac. Abr.* 222. *Gilb. Hiſt. C. P.* 208.

No privilege in *Qui tam* actions.

In an action *Qui tam*, for continuing ſheriff longer than a year, the defendant pleaded privilege in *C. P.* The plaintiff demurred, and it was agreed by *Shower*, that the King is party to this action; for if the plaintiff entered a *Retraxit*, yet the King may proceed, which was agreed by the court. Then, where an action is ſued by the King, the defendant ſhall not have privilege, for privilege is not good againſt privilege; and of that opinion the court ſeemed to be. Lord *Raym.* 27. *Salk.* 30. 3 *Salk.* 282. *pl.* 7. *Comb.* 319. *Forteſc. Rep.* 342. *Skin.* 549. *pl.* 10. 3 *Lev.* 398. *Lutw.* 193. *Lil. Abr.* 7. (H) *Bac. Abr. Ibid.*

Attorney attending prothonotary, not to be arreſted.

One *Forreſt*, an attorney, having attended the prothonotary, on taxing coſts for not proceeding to trial in this cauſe, upon his return home, was taken in execution on a *Capias ad ſatisfaciendum*, iſſuing out of the court of *King's Bench*: moved that he might be diſcharged. The court ſaid they could not diſcharge him from the *King's Bench* proceſs; but on producing an affidavit of notice of the motion, *&c.* the court made a rule for the officer and the plaintiff in that action to ſhew cauſe why they arreſted

arreſted *Forreſt*, and why the goods pledged with them for his enlargement, ſhould not be returned, On ſhewing cauſe, it appeared that *Forreſt* had voluntarily given the goods to the plaintiff in that action. The court ordered the rule to be diſcharged. *Pract. Reg. C. P.* 40. *Barnes* 138. *Rep. and Caſ. of Pract. C. P.* 104.

Or attends the execution of a writ of inquiry.

Same order made on an attorney's being taken in execution, whilſt he was attending the execution of a writ of inquiry. *Pract. Reg. C. P.* 41. *Barnes* 137. *Rep. and Caſes of Pract. C. P.* 102.

Or a judge on a ſummons.

George Harriſon, an attorney, being in *Serjeants Inn*, waiting to attend Mr. juſtice *Forteſcue* on a ſummons, was prevailed by an agent for one of his creditors, under pretence of buſineſs, to go with him to a coffee-houſe in *Chancery-lane* near *Serjeants Inn*; where, after the hour appointed for the attendance at the judge's chambers was expired, *Harriſon* was arreſted. It appeared that *Harriſon* had left his clerk at the judge's chambers, with directions to call him when the judge was there and at leiſure. The court ordered *Harriſon* to be diſcharged. *Barnes* 278. *Rep. and Caſ. of Pract. C. P.* 140.

Or attending a motion.

This ſame perſon was diſcharged, being taken in execution at the *Exchequer* coffee houſe, while he was attending a motion. *Rep. and Caſ. of Pract. C. P.* 64. An attorney attending his clients affairs at *Weſtminſter Hall*, being arreſted on an attachment for a contempt, in not paying money purſuant to a rule of court, diſcharged. *Pract. Reg. C. P.* 40. *Rep. and Caſ. of Pract. C. P.* 60.

A *Superſedeas* prayed to a *Latitat*, whereby the defendant was taken; and, becauſe he could not put in bail to the action, which was laid to 5000 *l.* he ſuggeſted he was an attorney of this court, and claimed his privilege to be ſued by bill; and by the court he was diſcharged, and a *Superſedeas* awarded, without coming hither by *Habeas Corpus* out of the country. 2 *Keb.* 338. *pl.* 2. See *Lil. Abr.* 194. (D) *Lutw.* 1667. 2 *Keb.* 435. *pl.* 78. See *Mod.* 80. *pl.* 32. 2 *Keb.* 555. *pl.* 45.

Philazer *K. B.*

A philazer of the court of *King's Bench* was arreſted, and he moved to be diſcharged upon common bail, becauſe of his privilege; but it appearing to the court, that he was very much indebted, they did not think fit to grant him his motion, but ordered him to put in bail to the ſheriff, and plead his privilege as he could. *Lil. Abr.* 189. (A) See 2 *Sid.* 164. *pl.* 3. as to his privilege in the *Exchequer*.

Philazer *K. B.*

A philazer of the *King's Bench*, arreſted by writ, was diſcharged on common bail; for he ought to be ſued by bill, as preſent in court. 2 *Salk.* 544. *pl.* 4.

Attorney's clerk; clerk of clerk of crown office.

Adjudged that an attorney's clerk has no privilege. *Comb.* 12. Nor the clerk of the clerk of the crown office. 2 *Show. Rep.* 87. *pl.* 284. Whether a prothonotary's (*a*) clerk. *Stra.* 546. See *Ventr.* 298. Lord *Raym.* 399. *Holt* 589. 2 Ld. *Raym.* 869. 7 *Mod.* 97. *Salk.* 4. *pl.* 9. 3 *Salk.* 283. *pl.* 8, 10, 11. *Stra.* 191, 192. *Barnard. K. B.* 141. 4 *Bac. Abr.* 225. *Barnes* 280. *Rep. and Caſ. of Pract. C. P.* 104, 105. *Forteſc. Rep.* 341, 342. Nor a philazer's clerk. 2 *Lil. Abr.* 456. (B) But the clerk of the clerk of the pells ſhall have privilege. *Comb.* 482. And a clerk in the office of the *Cuſtos Brevium*. *Cro. Car.* 11. *pl.* 2. See *Lil. Abr.* 116. (A) 3 *Lev.* 343. *Sid.* 74. *pl.* 5. So ſhall the curſitors clerks in *Chancery*. *Skin.* 521.

Prothonotary's clerk;

Philazer's clerk; clerk of the pells; clerk of *Cuſtos Brevium*;

Curſitor's clerk.

Tenants, and attendants of officers.

The court not only privileges their own officers, but likewiſe the tenants and attendants of their officers, that they ſhall not be impleaded but in the court where their maſters are attendants; but it muſt be ſuch ſervants as are neceſſary to them in their attendance, for they ſhall not have the privilege for any others. *Gilb. Hiſt. C. P.* 213, 214.

(*a*) If they have, it is only when they are plaintiffs; for their only privilege is to ſue out writs of attachment. Said arg. by Mr. juſtice *Chapple*. *Andr.* 44.

Thus the plaintiff may reply, that the defendant is not a ſervant of an officer in the court; but that he is husbandman in the country: traverſe, that he is ſervant to the officer on his attendance to the court. *Gilb. Hiſt. ibid.* 17 *Vin. Abr.* 530. *pl.* 5.

Officers of the *Exchequer.*

If an officer commence a ſuit here, no privilege in any other court ſhall prevail againſt him; becauſe his attendance here is requiſite, and his privilege here is attached firſt by his commencing his ſuit: and herewith all the precedents agree. By the court. *Hard.* 305. *pl.* 2. *Ibid.* 507. 3 *Salk.* 281. *pl.* 2. ſee 396. *Salk.* 194.

Where an officer or miniſter of the *Exchequer* is one of the parties in a perſonal action, he ſhall be ſued in that court; becauſe his abſence might hinder the King's affairs. 2 *Inſt.* 551. unleſs in a joint action. *Vern.* 246. *Caſ.* 239. *Eq. Caſ. Abr.* 349. (A) *pl.* 3. *March Rep.* 149. *pl.* 219. A ſervant to a miniſter or officer of court has no privilege againſt a privileged perſon elſewhere. *Hardr.* 365. *pl.* 2.

Servant to an officer of the court.

Auditor of the *Exchequer*; commiſſioners of the treaſury; garter king of arms; receiver general of the revenues; clerk of remembrancer; and of attorney of *Exchequer.*

Auditor of the *Exchequer* and his ſervants, commiſſioners of the treaſury, garter king of heralds, receiver general of the revenues, clerk of the remembrancer, of an attorney of the *Exchequer*, are intitled to the privilege of this court. *Hard.* 164. *pl.* 3. 2 *Sid.* 164. *pl.* 3. *Andr.* 46. 2 *Show. Rep.* 299. *pl.* 301. *Sav.* 131. *pl.* 204. Order of the houſe of *Commons*, of *Monday* 27th *Nov.* 1699. *Stat.* 2 & 3 *Ann. c.* 18. *ſect.* 1. *Sav.* 20. *pl.* 49. *Andr.* 45. *Rep. and Caſ. of Pract. C. P.* 47.

King's debtor.

Any man that has a ſpecial privilege in another court, as an officer of the court, or as an attorney, ſhall have his privilege againſt the King's debtor; becauſe the privilege of a man as debtor is but a general privilege. *Hard.* 365. *pl.* 2. This privilege was only for the benefit of the King, which is now diſuſed, and a *Quo minus* is no more than a common action in this court. 3 *Salk.* 281. *pl.* 1. *Hard.* 507.

It

Treaſurer of the navy.

It hath been held, that the treaſurer of the navy is inſtantly an accountant; and that an accountant's privilege will hold againſt a ſpecial privilege in another court, as an officer of the court or otherwiſe, though it be not alledged that ſuch an accountant is entered upon his account; for that every accountant may be attached by the court to make up his accounts, and muſt attend for that purpoſe *from day to day*, and the King has intereſt in his attendance. *Hardr.* 316. *pl.* 8. 3 *Salk.* 281. *pl.* 2. *Hardr.* 365. *pl.* 2.

Accountant.

But if an accountant has finiſhed his account, and reduces it to a debt, he ſhall have no privilege but as a general debtor. *Hardr.* 365. *pl.* 2.

King's debtor.

The King by writ of protection, might protect his debtor from being ſued or attached, until his debt was paid. But, by *Stat.* 25 *Ed.* 3. *c.* 19. the other creditors may have actions againſt the King's debtor, and proceed to judgment, but not to execution, unleſs they will pay the King's debt, *&c. Co. Lit.* 131. *b. Cro. Jam.* 477. *pl.* 10.

King's debtor or accountant no privilege of peerage or of parliament, except that of not being arreſted.

"No action, ſuit, proceſs, order, judgment, decree, proceeding in law or equity, againſt the King's original and immediate debtor, for the recovery of any debt originally and immediately due unto his majeſty, or againſt any accountant, or perſon liable to render any account to his majeſty, for any part of his revenues, or other original or immediate duty, or the execution of any ſuch proceſs, *&c.* ſhall be impeached or delayed by privilege of parliament; yet ſo that the perſon of ſuch debtor or accountant, being a peer of this realm, or lord of parliament, ſhall not be liable to be arreſted; or, being a member of the houſe of *Commons*, ſhall not, during the continuance of privilege, be arreſted by any ſuch proceedings." *Stat.* 12 & 13 *W.* 3. *c.* 3. *ſect.* 4.

Action againſt officer of revenue not ſtayed by privilege.

"Any action or ſuit may be commenced and proſecuted, in any of his majeſty's courts at *Weſtminſter*, againſt any officer or perſon employed in the revenue, or any other place of public truſt, for any miſdemeanor or breach of truſt relating to ſuch place of truſt, or any penalty impoſed by law to enforce

force the due execution thereof; and that no ſuch action, ſuit, or proceeding, although ſuch officer be a peer of the realm, or lord of parliament, or of the houſe of *Commons*, or otherwiſe intitled to privilege of parliament, ſhall be ſtaid by privilege." *Stat.* 2 & 3 *Ann. c.* 18. *ſect.* 1. Order of the houſe of *Commons*, of *Monday* 27th *Nov.* 1699.

But nothing in this act ſhall ſubject the perſon of ſuch officer, being a peer of this realm, or lord of parliament, to be arreſted; but that all proceſs ſhall iſſue againſt ſuch officer or perſon, being a peer or lord of parliament, as ſhall have iſſued againſt him out of the time of privilege: nor ſubject the perſon of ſuch officer, being of the houſe of *Commons*, to be arreſted during the time of privilege: and againſt ſuch, being of the houſe of *Commons*, ſhall be iſſued ſummons and diſtreſs infinite, or original bill, ſummons, attachment and diſtreſs infinite, which the reſpective courts are impowered to iſſue, until they appear. Same *Stat. ſect.* 2.

Clerks of *Exchequer.*

Holt chief juſtice was not ſatisfied that the privilege of the clerks of the *Exchequer* was due to them of common right. Said arg. 2 Lord *Raym.* 869.

Corporations and Companies.

Corporations or bodies politic, or public companies, whether ſole or aggregate, cannot be arreſted, as the King, biſhop, parſon, *&c.* 10 *Co.* 29. *b.* 31. *b.* As mayor and commonalty, dean and chapter. 10 *Co.* 29. *b.* *Co. Lit.* 250. 3 *Inſt.* 202. *Wood's Inſtitute of the Laws of England, b.* 4. *chap.* 4. *p.* 596. *of Edit.* 1763. 604 *of the Folio Edit.* 1754. *Salmon's Readings upon the Statute Law* 115. *Bohun's Inſtitutio Legalis, Edit.* 1732. *p.* 108. *Mod.* 164. 3 *Salk.* 46.

No *Capias* lies againſt corporate bodies.

A *Capias ad reſpondendum* does not lie againſt defendants who are ſued in a corporate capacity, but ſuch proceſs is altogether null and void. 2 *Barnes* 328, 329.

Parties in ſuits.

Defendant coming to give ſecurity of the peace, (but if it had been to have ſworn the peace the arreſt would have been allowed,) was afterwards arreſted in court, upon an action of falſe impriſonment, and had his privilege. *Comb.* 29.

The

The defendant had a former cauſe in *K. B.* wherein he was plaintiff, and one *Bateman Umphry* defendant; and in that he was ſerved with notice, that the preſent plaintiffs, who were two bailiffs, would juſtify as bail; and one of them ſent him a letter, that if he had any thing to ſay to them, they ſhould be at the coffee-houſe, next *Weſtminſter Hall* gate, the morning they ſhould juſtify. The defendant attended the motion accordingly; and as ſoon as they had juſtified, and the defendant went out with them to *Weſtminſter Hall* gate, they procured him to be charged with an action, at their ſuit for 100*l.* Upon this matter the defendant moved now, that the plaintiffs might anſwer the matters of the defendant's affidavit, for arreſting the defendant when he was attending the buſineſs of the court, and the court made a rule accordingly. *Barnard. K. B.* 251.

On motion to diſcharge the above rule; it was allowed that the court had gone ſo far as to releaſe perſons from arreſts, which they have been taken upon when attending the buſineſs of their own ſuits; but it was not known they had done this in any caſes but where the application was freſh before putting in of bail; whereas, in the preſent caſe, the defendant put in bail directly, and by that has ſubmitted to the juriſdiction of the court. The court ſaid, in the preſent caſe the plaintiff had a plain deſign in taking advantage of the defendant's attendance upon his former ſuit, and premeditated ſcheme in getting him here by the letter of one of them writ to him. Accordingly they thought the attachment ought to go; but, upon the plaintiff's agreeing to deliver up the bail-bond, and pay the coſts, the court only ordered, the attachment to lie in the maſter's hands. *Ibid.* 262.

Defendant. The defendant was arreſted, on his returning from an attendance in court upon the juſtifying his bail; ſerjeant *Wynne* moved, that he might be diſcharged; ordered accordingly. *Pract. Reg. C. P.* 341. *Barnes* 17. *Suppl. to Lil.* 12. *pl.* 3.

A *Capias ad reſpondendum* indorſed for bail being iſſued againſt the defendant, he, before the return of it, and before he was arreſted, put in bail before a judge, and gave notice thereof to plaintiff's attorney; but he not regarding the notice, cauſed the defendant to be arreſted, who being in cuſtody, moved for a *Superſedeas*; which, upon a rule to ſhew cauſe, was granted, the court being of opinion, the plaintiff not having excepted to the bail within twenty days after notice, the bail ought to ſtand. *Pract. Reg. C. P.* 50, 51. *Barnes* 82. See *Ibid.* 85.

Harriſon, after his attendance in court upon his cauſe, went, about three o'clock, in a coach, from *Weſtminſter* to *Chancery Lane*, with his ſolicitor and others, to give inſtructions for procedure in the cauſe; and there continued till ten or eleven o'clock, and then was arreſted by a bailiff, upon a *Capias ad ſatisfaciendum*, upon a judgment in *Scire facias*, upon a judgment againſt him in *Common Pleas*: and now it was moved, that he ſhould be diſcharged, for each party has privilege to attend his cauſe, *Mod.* 66. *pl.* 13. 2 *Lil. Abr.* 492. (G) and, if he be arreſted in going or returning, it ſhall be contempt of the court, upon which the officer ſhall be puniſhed, and the party diſcharged; but it was not allowed: For here it does not appear, that there was any contrivance by the defendants, or any concerned in the cauſe, to procure this arreſt, in which caſe the court perhaps, will extend its power againſt the procurors; nor does it appear, that the officer knew he had attended his cauſe at *Weſtminſter*; for his warrant was dated before the arreſt, and there was another *Ca. Sa.* taken in *Trinity* term preceding, returnable in *London*, where the action was brought, and a *Teſtat. Cap.* afterwards in *London* the firſt return of this term, before the *Ca. Sa.* upon which he was then taken; and the arreſt here was not in his attendance upon that cauſe, but he had continued many hours in another place; and, if the court ſhould diſcharge him, how ſhall the ſheriff be defended againſt an action for the eſcape? *Brownl.* 15.

It

It was ſaid, that the court can diſcharge if the arreſt was in view of the court, otherwiſe not. 2 *Lil. Abr.* 457. (E) *T. Raym.* 101. *Bulſt.* 85. Whether parties attending their cauſes at the ſeſſions are privileged, ſee *Sid.* 269. *pl.* 22. *T. Raym.* 100. *Lev.* 159. *Keb. Rep.* 845. *pl.* 38 and *Salk.* 544. *pl.* 6. Where a man went to confeſs indictment in the *King's Bench*, and was arreſted in his journey. The court would not diſcharge him, for he went of his own head; and there is a difference where a man attends upon the court by proceſs, and when not. *Com. Rep.* 411.

Not protected on a vexatious complaint.

When a perſon complains to the court of *K. B.* of a miſdemeanor, and it is adjudged his complaint is vexatious, the court will not allow the privilege of protecting him returning. 11 *Mod.* 79. *pl.* 13.

Notice of attending to make arreſt a contempt.

Where a man was going from court, where he had been to confeſs an indictment for an aſſault, and the plaintiff in an action for the ſame aſſault gets him arreſted, the court would not grant an attachment, becauſe there was no affidavit charging him to have had notice that he was going there for that purpoſe. 6 *Mod.* 90.

One that was coming into the court of *K. B.* to attend upon his cauſe, was arreſted as he was coming, and was forced to put in bail; but, upon a motion, and making it ſo appear unto the court, he and his bail were both diſcharged: and the party that arreſted him had been alſo puniſhed, had he not pretended that he knew not the party came about his buſineſs depending in the court; for the doing of this was an affront to the court, as well as an injury to the party arreſted. 2 *Lil. Abr.* 455. (D) 457. (D) *Goldſb.* 33, 34. *pl.* 8. See *Ibid.* 64. *pl.* 4.

Defendant muſt appear in perſon.

But in this caſe defendant muſt appear in perſon, that the court may examine him, and that they may be ſatisfied, upon his oath, that he was either proſecuting or defending ſome ſuit pending in that court, when he was arreſted. *Gilb. Hiſt. C. P.* 207.

Executing a commiſſion.

The defendant coming to execute a commiſſion, was arreſted, and had a *Corpus cum cauſâ* to ſet him at

liberty. *Toth.* 218. *Pract. Reg. Chanc.* 289. *Cohun's Curſ. Canc.* 496. *chap.* 18.

Coming to examine witneſſes.

Plaintiff was arreſted when he came up to examine witneſſes, and was diſcharged by ſuperſedeas of privilege. *Toth.* 218. *Pract. Reg. Chan.* 289. *Curſ. Canc. chap.* 18. *p.* 496.

Wife.

If a proceſs hath iſſued againſt an husband, and coming to defend it, the wife ſhall have privilege as well as the husband; for they are conſidered as one perſon in law, and the wife cannot anſwer without her husband. *Dy.* 377. *pl.* 30.

Inquiry after evidence.

If the court gives either plaintiff or defendant leave to inquire after evidence in any cauſe depending in court, and he be arreſted, he ſhall have privilege; but it is otherwiſe if he goes without the permiſſion of the court. For the court will then preſume it to be only an excuſe to get free from the arreſt. *Gilb. Hiſt.* 208. So, if one, on the day he has been attending his cauſe, be arreſted at ten o'clock at night, by one no way engaged in the cauſe, he ſhall not have privilege. *Gilb. Hiſt. C. P.* 207, 208. 4 *Bac. Abr.* 222. See *Com. Rep.* 411. 170, 171.

When not privileged.

A has a ſuit againſt *B.* in *C. P.* and afterwards *B.* is arreſted in an inferior court, when he was not coming to or returning from the defence of his ſuit, he ſhall not have privilege. *Jenk. Cent.* 172. *Ca.* 40.

The courts not only protect the perſons of their attendants, but likewiſe all thoſe things that are neceſſary for their journey, or the defence of their ſuits; but not merchandizes or goods for ſale or traffic. *Gilb. Hiſt. C. P.* 208.

Witneſſes.

One that is *ſubpœna'd* for a witneſs may have writ of privilege, to protect him from arreſts in going or returning. *Ventr.* 11. *Mod.* 66. *pl.* 13. *Lil. Abr.* 492. (G.) *Gilb. Hiſt. C. P.* 209. *Law of Evidence* 28. *pl.* 46. *Edit.* 1739. *Tri. per Pais, chap.* 15. *p.* 330. *Edit.* 1739. For ſince they are obliged to appear by proceſs of the court, they will not ſuffer any one to be moleſted, whilſt he is

paying obedience to their writ. *Gilb. Hiſt. C. P.* 209. *New Abr.* 565. 4 *New Abr.* 222.

The plaintiff being a butcher, brought an action againſt one *Fraberne*, for meat delivered into his family; which being carried down to *Wincheſter* aſſize, *Fraberne* brought the new defendant *Bliſſet*, an old woman who lived in the houſe, to ſwear, that the meat was ſent in upon her credit, and that ſhe was the debtor. The trial ended upon *Friday* about four in the *afternoon*; and on *Saturday*, about *ſeven*, as ſhe was going home in a coach to *Portſmouth*, the plaintiff arreſted her by a *Latitat*, for the ſame cauſe of action: and now it was moved, upon the protection of a witneſs in going and returning from the court, that an attachment might iſſue againſt the plaintiff and bailiff; and it was proved, that the *Latitat* was not delivered to the ſheriff till the day of the arreſt. On the other ſide it was inſiſted, though a witneſs ſhould have free liberty of going and returning, yet that did not extend to as long a time as ſhe thought proper to take; that *Portſmouth* was but twenty miles from *Wincheſter*, and the defendant might have been at home much ſooner; that ſhe was an old woman who lived in a garret, who was never to be met with, but was brought down merely to ſwear them out of their debt.

But the court ſaid, that the witneſs muſt have a reaſonable time to return in, and thought one day the leaſt that could be allowed; and that they could not try all the niceties of delays that might poſſibly happen; and whereas it was ſaid at the bar, that, in *Middleſex*, if a witneſs, returning from the ſitting, loiters by the way to drink a pot, his protection is determined; as to the later reaſon, the court ſaid, that concluded againſt the plaintiff by ſhewing a deſign.

A rule was pronounced for an attachment, but afterwards the parties agreed. *Gilb. Caſ.* 308. 1 *Stra.* 986. 4 *Bac. Abr.* 226. *Forteſc. Rep.* 164.

The court was moved to diſcharge one *Cullen*, that was arreſted as he was attending the court, to give teſtimony as a witneſs in a cauſe, and for an attachment

attachment againſt the parties that did arreſt him. *Germain* juſtice, abſent, *Roll* C. J. Take a *Superſedeas*, and let the parties ſhew cauſe why an attachment ſhall not be granted againſt them that arreſted him. *Sty.* 395.

If a witneſs, coming to teſtify in a cauſe in *Middleſex*, be arreſted in *London*, by one knowing the cauſe, he hath no remedy but by an *Habeas Corpus*, to examine and deliver him thereby; but if there be any contempt by the officer, *&c.* an attachment may afterwards be awarded againſt him; for they are as well to have privilege as the parties. *Law of Evid.* 29. *pl.* 47. *Keb. Rep.* 220. *pl.* 28.

In the caſe betwixt *Oliver*, protector, and *Syndercomb*, the privilege of the court was prayed, and granted, to protect a witneſs from being arreſted in coming or going from the court, who was to give evidence for the protector upon an indictment of high treaſon preferred againſt *Syndercomb.* Which note, 2 *Lil.* 456. (H.) 492. (H).

Jurors. As jurors are ſummoned by the proceſs of the court, they are equally obliged to appear as witneſſes; and therefore are no more to be moleſted, while they are obeying the commands of the court, than witneſſes, parties to ſuits, or other attendants on the court. See the two preceding heads.

Heirs. No attorney ſhall preſume, at his peril, to make, or cauſe to be made, any precept or writ with the clauſe *Ac etiam*, *&c.* againſt any heir, executor, or adminiſtrator, or in any caſe where, by the cuſtom of the court, ſpecial bail is not required. By rule of court of *Mich.* term, 15 *Char.* 2. rule 2. *K. B.* and of *Mich.* term 1654. *C. P. ſect.* 12. *Holt* 87. 6 *Mod.* 242. 12 *Mod.* 511. *Salk.* 98. *pl.* 4. *Styl. Rep.* 367. *Sid.* 63. *pl.* 34. *Hetl.* 72. 3 *Bulſt.* 316. See and note *Rep. and Caſ. of Pract. C. P.* 8.

An heir, ſued as ſuch, ſhall no more be held to bail than an executor. 12 *Mod.* 511. 2 *Lev.* 204. *Tho. Jo.* 82. *Keb.* 803. *pl.* 3.

Executors and adminiſtrators. An executor or adminiſtrator ſhall not be held to ſpecial bail, becauſe the demand is not on the

perſon, but *in Rem*, *viz.* the aſſets of the dead, unleſs there be a *Devaſtavit* ſuggeſted; for in ſuch caſe he may be arreſted. *Lev.* 39. *Salk.* 98. *pl.* 4. 3 *Bulſt.* 317. Executor not to be held to bail on the ſurmiſe of a *Devaſtavit*. *Ventr.* 321. But ſee *S. P.* ruled otherwiſe on motion, *Ventr.* 355. And if an *Habeas Corpus* be returned into any of the courts above, though the ſum be under 10 *l.* they will hold defendant to bail, that ſo the plaintiff may not be in a worſe condition than he was below, where the defendant was held to bail; but in caſe of an executor or adminiſtrator, or heir, no bail is required, even on an *Habeas Corpus*. *Lev.* 268. *Sid.* 418. *pl.* 2. 2 *Keb.* 512. *pl.* 4. *Salk.* 98. *pl.* 4. *Hetl.* 72. *Lev.* 245. *S. P.* reſolved *contra*. They ought not to have been held to bail below, the debt not being their own. *Gilb. Hiſt. C. P.* 37. *Keb. Rep.* 89. *pl.* 67. Executors or adminiſtrators ſhall not find ſpecial bail for the debt of the teſtator, though the debt be for a great ſum as 30000 *l.* or more; for it is not their debt, nor ſhall their bodies be liable to execution for it. 2 *Brownl. Rep.* 293. *Yelv.* 53.

An adminiſtrator who brings a writ of error, on (*a*) 3 *Jam. c.* 8. ſhall not give bail, though he is not exempted by the ſtatute. 4 *Mod.* 245. *Cro. Char.* 59. *pl.* 3. *Cro. Jam.* 350. *pl.* 2. *Lit. Rep.* 3.

When adminiſtrator may be arreſted.

But if an adminiſtrator brings a writ of error on a judgment *of his own goods*, upon a *Devaſtavit* alleged; *by the whole court*; He ſhall find bail, becauſe, being charged here *with his own goods*, it is not like the caſe where an adminiſtrator is charged *with the goods of his teſtator*; but here it is as if he were charged *in his own right*. *Lev.* 345. *Sid.* 368. *pl.* 4. 2 *Keb.* 371. *pl.* 28. *Lev.* 39.

Wife.

A motion in the treaſury to diſcharge the defendant's wife, taken on meſne proceſs without huſband. *Court*: She ſhall be diſcharged on a common appearance; for otherwiſe it might be in the power of an husband to ſet up ſham actions againſt

(*a*) Perpetuated by 3 *Char. chap.* 4. *ſect.* 4.

his

his wife, and keep her in continual impriſonment; but in caſe both husband and wife had been taken, then both ſhould be held till bail be given for both, for otherwiſe a woman might marry a priſoner, and thereby might defraud her creditors. *Rep. & Caſ. of Pract. C. P.* 117. *Barnes* 59.

If a married woman be arreſted, and the marriage is clearly made out, the court will order a common appearance; but in this caſe defendant appeared to have acted as a ſingle woman for twelve years, which made the matter doubtful. *Barnes* 80. 6 *Mod.* 105. 7 *Mod.* 10, 63.

If a married woman be arreſted, let cauſe of action be what it will, ſhe ſhall be diſcharged upon common bail, *Latch* 224. but if the husband be arreſted, he ſhall not be diſcharged by giving bail for himſelf, without giving of it for his wife likewiſe. 6 *Mod.* 17. *Lev.* 1. *ibid.* 216. *Salk.* 115. *Sid.* 395. *pl.* 2. *Keb.* 198. *pl.* 194.

Married woman ſealed a bond, and being arreſted and carried to priſon, upon affidavit made that ſhe was covert, and entering her appearance, the court diſcharged her without bail. *Freem. Rep.* 210. *pl.* 216.

An action of *trover* and converſion was brought againſt husband and wife, and the wife arreſted. *Twiſden:* The wife muſt be diſcharged upon common bail: ſo it was done in the lady *Baltinglas*'s caſe. [*Styl.* 475. juſt the contrary.] And where it is ſaid in *Croke*, that the wife in ſuch caſe ſhall be diſcharged, it is to be underſtood, that ſhe ſhall be diſcharged on common bail. So *Liveſay* ſaid the courſe was. *Mod.* 8. *pl.* 25.

Action was brought againſt huſband and wife, for a battery done by the wife; the huſband was a priſoner in the King's Bench before the action brought, and the plaintiff delivered a declaration to the turnkey of the priſon againſt huſband and wife for this battery; and, upon rules given to plead, judgment was entered by *ſays nothing* againſt both, and the wife taken in execution. Moved, that this was irregular; for, upon delivery of the declaration, the

huſband ſhould have filed common bail for him and his wife, or ſhould have made an attorney for him and his wife, who ſhould have appeared for them. And by *Holt* Chief Juſtice, the plaintiff ought to have ſued out proceſs againſt huſband and wife, and the ſheriff ſhould have returned *not to be found* for the huſband, and *taken the body* for the wife; and then upon common bail filed for her, there might be judgment againſt both. It was objected, if there be proceſs againſt huſband and wife, and *not found* for the huſband, and *taken* as to the wife, ſhe ſhall be diſcharged. To which *Holt* anſwered, No; ſhe ſhall not be diſcharged but upon common bail, and then new proceſs ſhall go againſt the huſband, with a *ſame day* given to the wife. And becauſe no bail was entered for the wife, the judgment was ſet aſide. *Afterwards*, in another caſe, *Holt* C. J. held, if an action be brought againſt huſband and wife, and the huſband is arreſted, he ſhall give a bail-bond for the appearance of him and his wife, and muſt put in bail for both; but if one bring an action againſt the huſband only, he cannot declare againſt huſband and wife. *Salk.* 114. *pl.* 3. *Comb.* 335.

If a *latitat* goeth forth againſt the huſband and wife, and the huſband only is taken, the huſband ſhall find ſurety for himſelf and his wife, or otherwiſe he ſhall lie in priſon until he find bail, as well for his wife as for himſelf; and ſaid, that this hath been the uſe of the *King's Bench* by the ſpace of forty years. *Goldſb.* 127. *pl.* 19.

Huſband and wife arreſted for a debt due from the wife while ſingle; bail above put in for both, and both rendered to the *Fleet* in diſcharge of bail. Motion to diſcharge the wife, detained by meſne proceſs, not in execution. If the wife had been arreſted before the huſband, ſhe muſt have been diſcharged on common appearance; after the huſband is arreſted, ſhe cannot be taken into cuſtody again. Caſe of liberty. Rule abſolute to diſcharge the wife by *ſuperſedeas*, on entering common appearance. 2 *Barnes* 74. *Sid.* 395. *pl.* 2. 2 *Keb.* 442. *pl.* 4. But ſee 10 *Mod.* 162.

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In *trover* againſt huſband and wife, and judgment and execution againſt both, the court refuſed to diſcharge her out of cuſtody, unleſs it could be ſhewn that there was fraud and colluſion between the plaintiff and the huſband to keep her there. 2 *Stra.* 1167, 1237. [*Lev.* 51. and *Ventr.* 49. denied to be law.]

Huſband and wife were arreſted for her debt whole ſole; and the court diſcharged her, and ſaid the huſband muſt lie till he puts in bail for both. 2 *Stra.* 1272.

A *latitat* was ſued againſt *J. S.* and *A. S.* huſband and wife, by *T. D.* The wife was arreſted, but the huſband could not be taken; the ſheriff returned, *I have taken the body*, for the wife, *but not to be found*, for the huſband; the wife herſelf did not appear for the huſband. The queſtion was, What ſhould be done in this caſe? And it was held by the court, that nothing could be done, unleſs there were bail put in by the huſband; for the wife without the huſband cannot be ſued, nor can put in bail; and againſt the huſband, unleſs he be firſt taken, and put in bail, there cannot be any declaration. See *Salk.* 115. And therefore, in this caſe, in regard the plaintiff cannot declare, the wife was diſmiſſed. And it was ſaid, that he ought to ſue them by proceſs of outlawry, and by that means he might have remedy; for it were a great miſchief that a married woman ſhould intermeddle, and merchandize, and procure goods into her hands, and the huſband abſenting himſelf, or keeping in his houſe, there ſhall be no remedy againſt them: and although it was alledged, that the courſe hath been in an information of recuſancy againſt huſband and wife, that the huſband appearing hath been compelled to find bail for himſelf and his wife, it was anſwered, that it was at the diſcretion of the court; and the reaſon thereof may be alſo, becauſe the huſband is to put in bail when ſhe appears, and the loſs lieth only upon him. But this reaſon will not ſerve where the wife only is arreſted. *Cro. Jac.* 445. *pl.* 23. See *Cro. Eliz.* 370. *pl.* 9. *Hut.* 86. *Cro. Char.* 58. *pl.* 2. *Lit. Rep.* 18. *Sid.* 20.

pl. 2. *Dy.* 271. *b. pl.* 27. *Keb.* 189. *pl.* 171. 12 *Mod.* 444, 445. *Leon.* 138. *Ca.* 189. See *chap.* 7. *Bail. P.*

Infants.

Plaintiff made affidavit for bail, that defendants, or one of them, were indebted for board, clothes, jewels, &c. provided for the wife; defendant, the husband, an infant, moved for a common appearance. The court held, that if an infant marries a woman of full age, (as in this caſe) he is liable to her debts; but thought plaintiff's affidavit not ſufficiently certain. Plaintiff had leave to make a new affidavit, and explain what was due before defendant the wife was of age, and what after; and whether the debt or any part, became due before the marriage, or after, plaintiff made a new affidavit accordingly, and the ſum for which bail was to be given was moderated at a judge's chamber. 2 *Barnd.* 72. See *Pract. Reg. C. P.* 224.

Infant may be arreſted for neceſſaries.

An infant may be arreſted for neceſſaries.

Bankrupt.

"Every bankrupt ſhall be free from arreſts in coming to ſurrender to the commiſſioners, and from actual ſurrender for forty-two days, or ſuch further time as ſhall be allowed to finiſh his examination, provided ſuch bankrupt was not in cuſtody at the time of ſurrender." *Stat.* 5 *Geo.* 2. *c.* 30. *ſect.* 5.

"If any bankrupt, who ſhall have obtained his certificate, ſhall be taken in execution, or detained in priſon, on account of any debts owing before he became bankrupt, by reaſon that judgment was obtained before ſuch certificate was allowed, it ſhall be lawful for any one of the judges of the court, wherein judgment has been ſo obtained, on ſuch bankrupt's producing his certificate allowed, to order any ſheriff or gaoler, who ſhall have ſuch bankrupt in his cuſtody, to diſcharge ſuch bankrupt without fee." *Ibid. ſect.* 13.

"All actions and proceedings thereon, for cauſes and matters ariſing before the time of the bankruptcy, of any ſuch bankrupt as aboveſaid, are diſcharged againſt him, and his bail ſo obtaining ſuch certificate ſo allowed as aforeſaid." *Ibid. ſect.* 47.

"In

"In caſe any bankrupt ſhall be arreſted, proſecuted, or impleaded, for any debt due before ſuch time as he became bankrupt, he ſhall be diſcharged upon common bail." *Ibid. ſect.* 7.

This extends not to debts due to a bankrupt as executor, but it is for this particular reaſon, becauſe they are appropriated to teſtator's debts; and if they were aſſigned, it would be a wrong, *viz.* a *Devaſtavit:* and it being objected, that it extends not to debts due to the bankrupt jointly with another, it was anſwered by lord Ch. J. *Parker*, in delivering the opinion of the court, that the caſe cited for that purpoſe from *Lev.* 17. is not determined. *Will. Rep.* 254. 10 *Mod.* 161, 245. *Gilb. Caſ.* 323.

Defendant having produced his certificate as a bankrupt, allowed and confirmed, moved for a common appearance in this action, which was debt on bond for payment of money by inſtalments, ſome of which were not payable till after the bankruptcy; and the queſtion was, whether this be a debt diſcharged by the certificate, or not? after the firſt default of payment, the bond is forfeited, and the penalty is the debt in law. The court will not enter nicely into the matter on bail or no bail. Rule for common appearance. 2 *Barnes* 82.

An action was brought, in 1748, by *Chetham*, the original plaintiff, againſt *Sibrell*, the original defendant; ſoon after which *Sibrell* became a bankrupt, and obtained his certificate allowed and confirmed: notwithſtanding which the bail-bond was lately put in ſuit, in the ſheriff's name, againſt *Spincks* the preſent defendant, one of the bail; and, on his application, a rule was made to ſhew cauſe, and afterwards abſolute to ſtay the proceedings. 2 *Barnes* 89.

A man rents a houſe for years, by leaſe, at *C.* and becomes a bankrupt, and ſurrenders all his goods and effects to the commiſſioners, according to the 5 *Ann. c.* 22. and, with the reſt, this leaſe; and his certificate was allowed; but being taken into cuſtody for non-payment of the rent ſince, he moved by counſel to be diſcharged: but the court would

would not grant it, and forced him to put in bail; for they ſaid, the act of parliament did not make void the contract between him and his landlord. 7 *Vin. Abr.* 129. *pl.* 2.

A note was given upon a day, promiſing payment a year after; the perſon who gave the note became a bankrupt after the note given, and before the day of payment; and the queſtion was, whether the bankrupt being diſcharged by *Stat.* 5 *Ann. c.* 22. and 5 *Geo. c.* 30. this note was diſcharged; and, by three barons againſt *Price*, it is not. *Bunb.* 120.

Defendant and his partner in trade had a joint commiſſion of bankruptcy taken out againſt them, under which they obtained a certificate. The plaintiff was a ſeparate creditor, and had obtained a judgment before the commiſſion or act of bankruptcy; and having now the body of the defendant in execution, the court was moved to diſcharge him, upon the authority of *Howard* againſt *Poole*, 2 *Stra.* 995. 2 *Vol. Gen. Syſt. Bankrupts* 251. *Law for and againſt Bankrupts*, printed in 1743, *p.* 289. *Dav. Law of Bankrupts* 431. Where it was held, that a ſeparate creditor might come in under a joint commiſſion; and alſo on *Eq. Caſ. Abr.* 55. 2 *Vern.* 707. 2 *Will. Rep.* 500. And the court diſcharged him accordingly. 2 *Str.* 1157. 3 *Will. Rep.* 24. *Barnard. K. B.* 469. *Fitz-Gib.* 281.

If there be two partners, and one of them becomes bankrupt, and, on a ſeparate commiſſion ſued out againſt him, his certificate is allowed, this does not only diſcharge the bankrupt of what he owed ſeparately, but alſo of what he owed jointly, and on the partnerſhip account, becauſe by the act of parliament, the bankrupt, upon making a full diſcovery, and obtaining his certificate, is to be diſcharged of all debts. Now, as the debts he owes jointly with another are equally his debts as what he owes on his ſeparate account, conſequently he is to be diſcharged of both his joint and ſeparate debts. And ſo it has been determined by the judges of

K. B.

B. by the lord chancellor *Parker*. 3 *Will. Rep.* 4. in a note.

Bankrupt taken upon an attachment for not performing an award; after which he became a bankrupt, and obtained his certificate, and now moved to be diſcharged; but was oppoſed, becauſe (it was ſaid) bankruptcy does not purge a contempt. *By the court*, This was a demand for which debt would lie; and the act ſays, he ſhall not be arreſted, proſecuted, or impleaded, for any debt due before the bankruptcy. It would therefore be hard to keep him in cuſtody when the duty is diſcharged; and therefore, in this caſe, he muſt be diſcharged. 2 *Stra.* 1152. By the diſcharge of a bankrupt husband, his wife will be for ever diſcharged. 10 *Mod.* 246, 247. *Will. Rep.* 257. *Gilb. Caſ.* 327.

Defendant, a bankrupt, was rendered in diſcharge of his bail after judgment, and now moved to be diſcharged purſuant to the bankrupt act. Plaintiff objected, that the words of the act extend only to perſons charged in execution, or by virtue of judgments; the judgment appeared to be for a debt due before the bankruptcy, and was entered in *Hilary* term laſt; the render was in the beginning of *April*, and the bankrupt's certificate was confirmed the 18th of *April*. It was argued for defendant, that the words of the act extended to bankrupts detained in cuſtody for debts due before they became bankrupts, which debts are diſcharged by the act; let them be detained how they will, in execution or otherwiſe, they are to be diſcharged. Court, after taking time to conſider, ordered defendant to be diſcharged. *Barnes* 261.

Defendant, in *January* 1728, drew bills on *Spain*, which in *March* were returned proteſted for non-acceptance; between the drawing and return he became a bankrupt; and being ſued in execution as the drawer, he moved, on the act 5 *Geo.* 2. *c.* 30. to be diſcharged, it being a debt contracted before his bankruptcy.

On the other ſide it was inſiſted, that this cauſe of action aroſe upon the non-acceptance and proteſt, which

which are both neceſſary to be averred in order to maintain the action, and the charges thereof are to be recovered.

But by the court: The principal is the drawing the bills, and therefore he muſt be diſcharged. *Ya query.* 2 *Stra.* 949. 2 *Barnard. K. B.* 251, 255.

The defendant gave a bond of indemnity, and before any breach became a bankrupt; and being now ſued moved to be diſcharged on common bail; but the court compared it to the caſe of * *Tully* and *Sparkes*, and ordered he ſhould give ſpecial bail. 1 *Stra.* 1160.

Defendant, the 19th of *May* 1734, was bail on a writ of error. On the 25th of *October* 1734 he committed an act of bankruptcy, and after a commiſſion obtained his certificate. On the 12th of *Nov.* 1735, the judgment was affirmed, and in debate upon the recognizance he pleaded his diſcharge, and that the cauſe of action aroſe before his bankruptcy: and the Ch. J. on the trial held, that the defendant was not diſcharged according to the caſe of * *Tully* and *Sparkes*; for this was but a contingent debt, for which the plaintiff could not come in under the commiſſion, the ſtatute 7 *Geo. c.* 31. only letting in thoſe where the payment was certain, though future. There was a verdict for the plaintiff. 2 *Stra.* 1043.

On a motion to diſcharge the defendant out of execution, as being a bankrupt on the ſtatute 5 *Geo.* 2. *c.* 30. it appeared, that the debt was contracted before the bankruptcy, and ſued for and recovered pending the commiſſion, and before any certificate obtained: and the judgment was afterwards affirmed on error, and coſts given on ſuch affirmance.

And the court diſcharged him as to all; for not having his certificate, he could not plead to the action, and theſe coſts were attendant upon the original judgment, and cannot be conſidered as for the

* 2 Ld. *Raym.* 1546, 1570. 2 *Stra.* 867, 868. *Barnard. K. B.* 59, 67, 79, 81, 110, 325, 335, 343. *Doc. Law of Bankrupts* 248. See *Andr.* 386.

of execution, when it appeara there ought to ve been no execution though no writ of error had n brought. 2 *Stra.* 1196.

Rule made abſolute (on affidavits of ſervice, no ſe being ſhewn to the contrary) for leave to enter iſcharge on the recognizance of bail, defendant nding the action having become a bankrupt, had ained his certificate allowed and confirmed. 2 *rnes* 87.

Rule made abſolute to diſcharge defendant, a bankt, taken in execution for a debt accrued before bankruptcy: defendant could not plead his diſrge in the firſt inſtance, becauſe he did not obn his certificate until after he was obliged to plead. t it was inſiſted by plaintiff's counſel, that he ght have pleaded *after the laſt continuance.* Theſe es muſt be conſidered equitably. *Ibid.* 264.

A bankrupt ſo found, was ſued for a debt on nd, before his certificate allowed, but he had ſurdered his effects, and ſubmitted to be examined, his certificate not being allowed, he pleaded *nat deed*, and judgment was given againſt him. He d afterwards a certificate allowed and confirmed. he obligee, three or four years afterwards, brought *Scire facias* upon the judgment; and the dedant pleaded the *Stat.* 5 *Ann. chap.* 22. and t the cauſe of action accrued before his bankptcy: and, upon iſſue joined, it was found againſt bankrupt, he (as was alledged) not being able to the commiſſion, or a copy thereof, to produce the trial, and the plaintiff after had judgment. he plaintiff got an injunction; but the maſter of rolls, upon hearing, diſmiſſed it, as a matter olly at law; but, upon appeal, L. C. *Macclesld* reverſed the decree, but ſeemed to admit, that, re the caſe only matter of miſpleading, equity uld not relieve; but, upon the ſeveral circumnces of the caſe, a perpetual injunction was grant. 2 *Will. Rep.* 70.

Gore brought an action for rent againſt *Bagſhall*, bankrupt, and obtained judgment before his certicate was allowed by Lord Chancellor; and the

certificate not being allowed till after the rules of pleading were out, the bankrupt had no opportunity to plead his certificate, and take the benefit of the act 5 *Ann.* But in the *Scire facias* againſt the bail, the certificate was pleaded, and the plea over-ruled; ſo that the bankrupt has no relief but in equity, or by *Audita querela*, which is an equitable remedy at law. A motion was made by Sir *Joſeph Jekyl* for an injunction; but *Cowper* C. denied the motion, (though Sir *Joſeph Jekyl* ſaid, there were ſeveral precedents of injunctions of this ſort, but had none ready to produce) becauſe this was a merciful law made in favour of the bankrupt, and prejudice of the creditors, and therefore not to be extended in equity farther than at law. 7 *Vin. Abr.* 131. *pl.* 5.

Inſolvent debtors.

The defendant gave his note for 36 *l.* He was afterwards diſcharged on the inſolvent debtors act; afterwards meeting the plaintiff, he promiſed to pay the debt at two guineas a month, and paid twelve guineas accordingly. And being now ſued for the reſt, the court diſcharged him on common bail, ſaying it was no new conſideration, but the old debt. 2 *Stra.* 1218, 1233.

Defendant having borrowed 500 *l.* of plaintiff, gave her a mortgage for ſecurity, which mortgage was accidentally burnt. Defendant had paid 100 *l.* in part; and, in *April* 1738, was prevailed upon to give plaintiff a new bond for the remaining principal and intereſt; whereon an indorſement was made, ſigned by plaintiff, acknowledging the new bond to be for the old debt. Defendant, after having obtained his diſcharge from the ſeſſions as a fugitive for debt, was arreſted on this new bond, and applied for a common appearance, and had a rule to ſhew cauſe, which was made abſolute. The juriſdiction at the ſeſſions is final, no appeal lies from it. 6 *Mod.* 301. 2 Ld. *Raym.* 1089. *per the court:* This debt appears to be contracted, incurred, and occaſioned before the day for that purpoſe mentioned in the ſtatute, which ſtatute ex-

nds to 500 *l.* debt, beſides the intereſt and coſts. *Barnes* 82.

N. B. The laſt inſolvent debtors act, *viz.* 1 *Geo.* . *c.* 17. *ſect.* 4. extends to 1000 *l.*

Holt delivered the opinion of the court, and alſo f the judges of the *Common Pleas*, whom he ſaid e had conſulted in the following caſe, which was his: *J. S.* is in gaol for 20 *l.* and no more, and is iſcharged by the new act of parliament, *viz.* 2 & *Ann. c.* 16. Then, after ſuch diſcharge, he is ar-eſted for a debt of above 100 *l.* due before the diſ-harge; and the queſtion was, if he ſhould be diſ-harged again without ſpecial bail? He ſaid it ſeemed oubtful, becauſe of the words in the ſtatute, *viz. r any debt* whatſoever.

But then the proviſo is to be conſidered, which is, *rovided that no man ſhall be diſcharged by virtue of his act*, if he ſtand charged, and be indebted above oo *l.* now it is objected, that this ſhall be applied o the firſt diſcharge only: but he ſaid, it ought to e applied to the ſecond diſcharge as well as to the rſt; for he that is a ſecond time diſcharged, is as uch diſcharged by virtue of this act, as he that is iſcharged the firſt time. Beſides it was the intent f the act, that no man ſhould be diſcharged that wed above 100 *l.* nor can the diſcharge of the other ebts be a diſcharge in this, wherewith he was ever charged. 11 *Mod.* 36. *pl.* 7. 6 *Mod.* 310. Ld. *Raym.* 1088.

One who had been diſcharged upon the act of oor priſoners, gave bail to an action of debt upon ond with which he was charged in priſon, and onfeſſed the action; and that execution might go gainſt his goods, *&c.* plaintiff takes execution on oods, and likewiſe ſues the bail, who ſurrender heir principal in diſcharge; and this appearing upon notion, the court ſaid, that bail were actually diſcharg-d by the pleading and judgment, and ordered him to ring the record of the judgment into court, where-pon he was taken in execution, and that they hereupon would diſcharge him. 6 *Mod.* 22.

The

The producing a duplicate of defendant's diſcharge as a fugitive, held ſufficient; and affidavits on plaintiff's part, to ſhew that defendant was not abroad beyond the ſeas 1ſt *January* 1747, refuſed to be read. This ſhould have been objected at the ſeſſions: it may be pleaded, but cannot be entered into on the queſtion of bail, or no bail? Rule made in the treaſury for a common appearance. 2 *Barnes.* 81.

Defendant produced a duplicate of his diſcharge as an inſolvent debtor, and after having put in bail before a judge, moved in the treaſury to be diſcharged on entering a common appearance; which, upon hearing the attornies on both ſides, was granted, and the bail-piece ordered to be vacated; defendant being conſidered as in cuſtody of his bail, and his perſon being by the ſtatute to be diſcharged. 2 *Barnes* 85.

Motion by defendant for a common appearance, on producing a duplicate of his diſcharge at the ſeſſions of the peace, under *Stat.* 21 *Geo.* 2. *c.* 31. as a fugitive for debt. Plaintiff objected, that defendant was an *Iriſhman*, and, inſtead of flying from his native country, fled to *Ireland*, as mentioned in the duplicate; and that *Ireland* is not within the words of the ſtatute, (foreign parts). The court did not think it neceſſary to give an opinion, whether the defendant was within ſtatute, or not; or whether, on the face of the duplicate, the ſeſſions had exceeded their juriſdiction. The quarter-ſeſſions are to determine as to immediate liberty; afterwards the court, or a judge, are to diſcharge a defendant, on producing his duplicate. Plaintiff may put the point on trial, but the defendant muſt not remain in cuſtody till the determination. Rule abſolute for a common appearance. 2 *Barnes* 88.

An action of debt upon a bond of 200 *l.* Defendant, without craving *Oyer* of the bond or condition, pleads that he was diſcharged by the act of poor priſoners, 2 & 3 *Ann. c.* 16. The chief juſtice took exception, that the condition of the bond not

appearing,

appearing, the whole 200 *l.* muſt be taken to be a debt, and conſequently the defendant not within the act of parliament, (though in truth the bond was only for payment of 100 *l.*) And for this reaſon judgment was given for the plaintiff by the whole court. For they could not take notice, but that the whole 200 *l.* was a juſt debt to the plaintiff.

The chief juſtice ſaid, that there were three ſorts of diſcharges by this act. Firſt, the original diſcharge by the juſtices of the peace at ſeſſions out of actual cuſtody. Secondly, if a perſon ſo diſcharged was arreſted again, there was a ſecond diſcharge upon common bail. And a third, whereby the body of the debtor was exempted from being liable to be taken in execution. But that the proviſo extended to all theſe, that no perſon ſhould have any benefit of any of them, that was indebted above the ſum of 100 *l.* principal money and damages.

Powell juſtice ſaid, that if the money in the condition was not paid at the day, the intereſt was damages. 2 Ld. *Raym.* 1196.

[*Nothing on this ſubject is to be met with either in* Bacon's *or* Viner's *Abridgment.*]

" No volunteer ſoldier in *Great Britain* or *Ire-* Soldiers.
land, or *Jerſey*, *Guernſey*, *Alderney*, or *Sark*, or the iſlands thereto belonging, or in any of the plantations during the continuance of this act, (which is the mutiny act, and one of them is paſſed annually, and has been ever ſince the year 1713.) ſhall be liable to be taken by any proceſs or execution whatever, (other than for ſome criminal matter;) unleſs ſuch proceſs, *&c.* be for a real debt, or other juſt cauſe of action; and unleſs, before taking out ſuch proceſs, (not being for a criminal matter) plaintiff, or ſome other perſon (ſo in the act) on his behalf, make an affidavit; that to his knowledge, the ſum juſtly due, or the debt or damages and coſts, for which the execution is iſſued, amounts to 10 *l.* over and above all coſts of ſuit in the ſame action, or in any other action on which the ſame ſhall be grounded; a memorandum of which oath is to be marked on the back of the writ." *Stat.* 2 *Geo.*

3. *c.* 11. *ſect.* 65. nor volunteer marine. 2 *Geo.* 3. *c.* 12. *ſect.* 37.

Judgment upon a writ of inquiry in the *Palace Court*, for 11 *l.* 11 *s.* 4 *d. viz.* 3 *l.* 17 *s.* 4 *d.* damages, and 7 *l.* 14 *s.* coſts; the defendant moved the judge of that court, that no execution might iſſue againſt his perſon, he being a ſoldier in his majeſty's ſervice; which was ordered accordingly, with directions to the defendant to apply for coſts in caſe his perſon ſhould be taken in execution; the plaintiff brought an action of debt upon that judgment in this court, and held the defendant to bail, who moved that the bail-bond might be delivered up on entering an appearance, and obtained a rule to ſhew cauſe, and for coſts. On ſhewing cauſe the court was of opinion, that though the former acts of parliament have been proved defective in preventing ſoldiers being taken out of his majeſty's ſervice, yet the laſt ſtatute of 14 *Geo.* 2. *c.* 9. *ſect.* 53. is ſufficient, the original debt being under 10 *l.* and the plaintiff having proceeded to hold the defendant to bail, after he knew the opinion of the judges of the *Palace Court*, the rule was made abſolute. *Pract. Reg. C. P.* 61. *Barnes* 312.

Barnes ſays it was 13 *Geo.* 2. but that muſt be a miſtake, for the words in the mutiny act for that year are the very ſame as have been in it for ſeveral years before; it was 14 *Geo.* 2. *c.* 9. as we have preſumed to alter it above: it ſeems ſomewhat extraordinary, that the judges ſhould take notice of an act paſſed 13 *Geo.* 2. (according to *Barnes*) in a determination given in *Trinity* term, 11 & 12 *Geo.* 2. (in which term the above note appears to be taken) eſpecially when the act, which occaſioned the alteration in their lordſhips opinions, did not really paſs till 14 *Geo.* 2. The conſtruction however once was upon the mutiny act, that if more than 10 *l.* had been recovered by a judgment for damages and coſts in an action for a debt under 10 *l.* and an action of debt was brought upon this judgment, a ſoldier ſhould not be diſcharged upon common bail; the court being of opinion, that as the debt, which the

were to conſider, was the ſum recovered by the judgment, defendant ought to be held to ſpecial bail. *Pract. Reg. C. P.* 59. *Ibid.* 60. *Barnes* 311. *Rep. and Caſ. of Pract. C. P.* 89. *Barnes* 312. But the law is now otherwiſe; for in the laſt mutiny act, 2 *Geo.* 3. *c.* 11. *ſect.* 65. and in all the mutiny acts for ſome years paſt, it has been provided, "that the original ſum for which proceſs ſhall iſſue, or original debt for which execution ſhall be iſſued out, ſhall amount to 10 *l. over and above all coſts of ſuit in the ſame action, or in any other action on which the ſame ſhall be grounded.*"

The firſt mutiny act, in which the above words printed in *Italics* appeared, was 14 *Geo.* 2. *c.* 9.

This exemption from being arreſted, (except for criminal matter, or a debt of 10 *l.*) extended formerly only to volunteers. But by 30 *Geo.* 2. *c.* 8. *ſect.* 20. it is enacted, "That the commiſſioners, preſent at a meeting for liſting ſoldiers, as in this act is before directed, ſhall cauſe the 2d and ſixth ſections of the articles of war, againſt mutiny and deſertion, to be read to the men impreſſed by virtue of this act, and from and after the reading the ſaid articles of war, every man ſo impreſſed ſhall be deemed a liſted ſoldier to all intents and purpoſes, and ſhall not be liable to be taken out of his majeſty's ſervice by any proceſs, (other than for ſome criminal matter)." As the words of this act go no further, ſuch ſoldier may be arreſted on an execution.

A *Latitat* iſſued out of the *King's Bench* to the ſheriff, to arreſt a man; and the ſheriff returned, that the man was liſted according to the act 4 *Ann.* c. 10. *therefore I cannot take him.*

The above act was for the better recruiting his majeſty's army and marines, which has been long ſince expired.

Motion againſt the ſheriff, for as pretended, he ought to have arreſted the man; becauſe by the act the plaintiff had liberty to go on to judgment and execution againſt any thing but the defendant's body, and then the court ſhould diſcharge him on

common bail, if he appeared to them to be liſted regularly; but the ſheriff ſhould not take upon him to determine whether he was regularly liſted. But the court, upon conſideration, held it to be a good return; and that this act worked by way of *Superſedeas* to any proceſs to be iſſued againſt perſons liſted; and that if the ſheriff ſhould arreſt ſuch a perſon, he would be liable to an action of falſe impriſonment; and they ſaid, it appeared, that the act did not intend that the man ſhould be arreſted, and then diſcharged on common bail, by the *proviſo*, "That the plaintiff, upon leaving notice in writing at the defendant's laſt place of abode, or giving to the defendant ſuch notice in writing of the plaintiff's cauſe of action, might file common bail for the defendant, and proceed to judgment, &c. that in caſe the man were not regularly and fairly liſted, this was a falſe return, and the plaintiff had his remedy againſt the ſheriff by action for the falſe return." 2 *Ld. Raym.* 1246.

A judgment was had againſt the defendant, and after judgment obtained, he voluntarily liſted himſelf for a ſoldier; and after the ſaid liſting, he was taken in execution by virtue of *capias ad ſatisfaciendum* upon that judgment. Moved that he might be diſcharged according to the late act of parliament, (4 *Ann. c.* 10.) which ſays, *That any perſon that voluntarily liſts himſelf a ſoldier, ſhall not be taken out of her Majeſty's ſervice by any proceſs whatſoever.* But, by the court, the motion was denied; for the words, *any proceſs*, muſt be intended only of a mean proceſs, and not to be extended to executions; for that would be hard upon creditors, and put them without remedy. Wherefore defendant was not diſcharged. 11 *Mod.* 252. *pl.* 2. 234. *pl.* 4.

Holt C. J. ſaid, he was never of opinion that executions were within the above act, though the judges of *C. P.* were of that opinion. 11 *Mod.* 234. *pl.* 4.

To remove all doubt as to this, the words now conſtantly inſerted in the mutiny act are, "That no perſon liſted as a volunteer in his Majeſty's ſervice as a ſoldier, ſhall be liable to be taken out of his

is Majeſty's ſervice by any proceſs *or execution* what-ever, (other than for ſome criminal matter) un-ſs for a real debet," *&c.* 2 *Geo.* 3. *c.* 11. *ſect.* 65. he firſt mutiny act, in which the words *or execu-on* were added, was that of 4 *Geo. c.* 4.

A ſoldier being in cuſtody on a writ *de excommuni-to capiendo*, for non-payment of coſts in a ſuit for thes in a *Court Chriſtian*, he was ordered by the urt of *King's Bench* to be diſcharged, as being ithin the reaſon of the mutiny act. 11 *Mod.* 191. 6.

Motion to diſcharge one upon common bail, upon e liſting act. The caſe was, one was liſted into e *Queen*'s ſervice, ſerved ſome time, and afterwards as diſcharged, upon his finding another able-bodied an, who is now in the army. The queſtion was, hether the clauſe in the act, *or find another able-died man*, ſhall refer to the time of his liſting before uſtice of the peace, or whether any time afterwards ll do, provided the man whom he finds continues the ſervice?

The court were of opinion, that the latter was fficient; and thereupon the man was diſcharged. *Mod.* 235. *pl.* 6.

A man puts in ſpecial bail to an action, and plain-f had judgment againſt defendant by default. Bail rendered defendant; it was moved to diſcharge fendant, becauſe he had liſted himſelf a ſoldier after bail put in, and before judgment, but refuſed by court. 2 *Vern.* 697.

It was moved to have one diſcharged upon the act & 11 *Will.* 3. *c.* 11. *laſt ſect.* for diſbanding the ny, whereby ſoldiers are exempted from ſuit for ee years, upon affidavits. By *Holt*: All we can is to order common bail; he muſt diſcharge him-f of the action by pleading the act, *&c.* and the intiff may traverſe his allegations; and ſo was the e: 12 *Mod.* 336.

Motion to diſcharge the defendant out of execu-n, he being an out-penſioner of *Chelſea College*. Out-penſioner of *Chelſea* hoſpital. uſed, he not being a ſoldier in actual ſervice. e caſe of *Bowler* againſt *Owens* was cited by the court.

court. *Pract. Reg. C. P.* 59. *Barnes* 311. *Rep. & Caſ. of Pract. C. P.* 77. *Pract. Reg. C. P.* 60.

Trooper. A trooper, who liſted on the 16th of *May*, was arreſted on the 19th. Upon a motion to diſcharge him on common bail, it was ſaid for Plaintiff, That, as the affidavit only went for his learning to ride, this is not doing duty as the act requires, but only to qualify himſelf for doing duty. *By the court:* If he is doing duty, he receives his pay, and muſt be diſcharged on common bail. *Stra.* 2. 10 *Mod.* 347.

Gunner in train of artillery. Upon a motion to diſcharge a gunner in the train of artillery on common bail, it was inſiſted for Plaintiff, That a gunner receives one ſhilling a day for his pay, that he is appointed by warrant, and that he is in the nature of a commiſſion officer. To this it was anſwered, That a gunner is liſted as common ſoldiers are, and that he is liable to all the penalties in the mutiny act, to which common ſoldiers are liable. *By the court:* We are informed that a gunner is within the deſcription of a common ſoldier; the extraordinary pay is only in conſideration of the ſkill requiſite in his place. He was diſcharged upon common bail. *Stra.* 7. 10 *Mod.* 346.

Life-guard-man. Defendant, a life-guard-man, having been arreſted by a *capias ad ſatisfaciendum*, in order to obtain his liberty paid a ſum of money.

On ſhewing cauſe againſt a rule why the ſaid money ſhould not be repaid, it was inſiſted for plaintiff, that a life-guard-man is not to be conſidered as an inliſted ſoldier; for that, ſo far from receiving any inliſting money, he uſually gives ſixty guineas or more, for his place. The propriety of the preſent application was alſo objected to, becauſe it was not for the obtaining of liberty, but to have money repaid, which this court has in no inſtance ordered to be done.

Wright juſtice (*Lee* C. J. being abſent). That giving money is not neceſſary to an inliſting, and as he was forced to pay money for his liberty, the preſent application to this court is very proper.

It was ordered to ſtand over, till an inquiry could be made in what manner this man was inliſted; and

erwards, in the ſame term, a certificate being pro-
uced, that he was inliſted as a private ſoldier, and
hat the articles of war were read to him, the rule
vas made abſolute. 4 *Bac. Abr.* 576.

" Officers of the *militia*, and private *militia men*, Militia.
hall, from the time of their being drawn out *into*
ctual ſervice, and embodied, be ſubjected and made
able to all the proviſions contained in the yearly
cts againſt mutiny and deſertion, relating to officers
nd ſoldiers muſtered, liſted, or in pay, in his Ma-
eſty's ſervice, excepting only as to ſuch particulars
s are or ſhall be otherwiſe ſpecially provided for,
y any act of parliament, for regulating the *militia*
orces." Stat. 2 *Geo.* 3. *c.* 20. *ſect.* 16.

A mariner ſhould neither be arreſted, nor taken Sailors, or ma-
orth of a ſhip making ready to ſail, for any debt; riners.
ut only his hire, and as much other goods as he
ath in the ſhip, may be arreſted for it, according
o the value of the debt, and the maſter to be an-
werable for all; becauſe the ſhip is compared to a
an's dwelling houſe, which is his ſure refuge by the
w, except it be for a ſworn debt, or a penalty to
he King through the ſame crime. *Mal. Lex Merc.*
05. *chap.* 23.

No ſeaman ſhall be liable to be taken by any pro- Seaman.
eſs or execution whatſoever, in any part of his
Majeſty's dominions, (other than for ſome criminal
natter) unleſs ſuch proceſs, *&c.* be for a real debt,
r other juſt cauſe of action; and unleſs, before
aking out ſuch proceſs, (not being for a criminal
natter) plaintiff, or ſome other perſon [ſo in the
ct] on his behalf, make an affidavit, that to his
nowledge the ſum is juſtly due, or the debt, or
amage and coſts, for which the execution is iſſued,
mounts to 20*l.* * at leaſt; a memorandum of which
ath is to be marked on the back of the writ.
tat. 31 *Geo.* 2. *c.* 10. *ſect.* 28. 1 *Geo.* 2. *ſtat.* 2.
. 14. *ſect.* 15.

* This act runs almoſt *verbatim* with the mutiny acts,
xcept that in thoſe acts after the words, " 20*l.* at leaſt,"
re added, " *over and above all coſts of ſuit, in the ſame ac-*
ion, or in any other action, on which the ſame ſhall be grounded."

Defendant being a ſeaman, in actual ſervice of the King, was arreſted, and held to bail in the palace court; he removed the action by *habeas corpus*, and was diſcharged by this court on a common appearance, according to ſtat. 1 *Geo.* 2. *ſtat.* 2. *c.* 14. *ſect.* 15. the debt being under 20*l.* Plaintiff objected, that defendant had abſented himſelf two days after his time of leave given. But court held, that the ſervice continues whilſt defendant's name remains in the ſhip books. 2 *Barnes* 71.

By reaſon of the cauſe of action, no arreſt for ſmall ſums.

"No perſon ſhall be held to ſpecial bail upon any proceſs iſſuing out of any ſuperior court, where the cauſe of action ſhall not amount to 10*l.* nor out of any inferior court, where the cauſe of action ſhall not amount to 40*s.* And in all caſes where the cauſe of action ſhall not amount to 10*l.* in a ſuperior court, or to 40*s.* in any inferior court, (and the plaintiff ſhall proceed by way of proceſs againſt the perſon) he ſhall not arreſt the body of the defendant, but ſhall ſerve him perſonally, within the juriſdiction of the court, with a copy of the proceſs; and if ſuch defendant ſhall not appear at the return of the proceſs, or within four days after, it ſhall be lawful for the plaintiff, upon affidavit being made and filed of the perſonal ſervice of ſuch proceſs (which affidavit ſhall be filed *gratis*), to enter a common appearance, or file common bail for the defendant, and to proceed thereon as if ſuch defendant had entered his appearance, or filed common bail". Stat. 12 * *Geo. c.* 29. *ſect.* 1.

Special bail.

Where a debt is 10*l.* or upwards, by courſe of the court, ſpecial bail is required; otherwiſe not. Not common, where an action of debt is brought upon a bond of 20*l.* conditioned for the payment of nine pounds, to hold to bail; for though the penalty, which is the legal debt, exceeds ten pounds, yet the real and equitable debt is leſs. But upon ſome particular caſes, as where it is to be feared a perſon will run away, *&c.* the court will hold to bail, for the legal debt exceeds ten pounds. 10 *Mod.* 24.

* Perpetuated by 21 *Geo.* 2. *c.* 3.

"Where

" Where the cauſe of action ſhall not amount to ten pounds in any ſuperior court, or to forty ſhillings in any inferior court, no ſpecial writ nor proceſs, eſpecially expreſſing the cauſe of action, ſhall be iſſued; and every attorney or officer of ſuch courts, ſuing forth or iſſuing any ſuch proceſs, ſhall forfeit ten pounds to the perſon aggrieved." Stat 5 *Geo.* 2. c. 27. *ſect.* 5. No ſpecial writs for ſmall ſums.

" In all caſes where the plaintiff's cauſe of action ſhall amount to 10*l.* or 40*s.* as aforeſaid, affidavit ſhall be made and filed of the cauſe of action, which affidavit may be made before any judge or commiſſioner of the court, out of which ſuch proceſs ſhall iſſue, or elſe before the officer who ſhall iſſue ſuch proceſs, or his deputy), and for ſuch affidavit 1*s.* over and above the ſtamp duties ſhall be paid, and no more; and the ſum ſpecified in ſuch affidavit ſhall be indorſed on the back of ſuch writ or proceſs, for which ſum ſo indorſed the ſheriff, *&c.* ſhall take bail, and for no more; but if any writ or proceſs ſhall iſſue for 10*l.* or upwards, and no affidavit or indorſement ſhall be made as aforeſaid, the plaintiff ſhall not proceed to arreſt the body of the defendant, but ſhall proceed in like manner as is by this act directed, in caſes where the cauſe of action does not amount to 10*l.* or 40*s.* as aforeſaid." *Ibid. ſect.* 2. Before arreſt, oath to be made of the debt.

In an action for money won at play, *Gould* and *Turton* were for denying ſpecial bail, for ſince plaintiff played upon tick, they would not help his ſecurity; but by *Holt*, the practice has been otherwiſe, and the contract, if under one hundred pounds, is lawful, and plaintiff ventured his money againſt it; and to ſay they were not to better his ſecurity, would as well prove there ſhould be no bail in an *indebitatus aſſumpſit*, &c. *Salk.* 100. *pl.* 10.

Holt Chief Juſtice ſaid, they never ought to enter into the merits of a cauſe upon a queſtion about bail; for to order common bail upon merits, would ſlur a man's cauſe of action, and no man ought to have his cauſe tried with diſparagement upon it; and though this may be for money won at play, yet it

was

was a lawful contract which the act of 16 *Char.* 2. *c.* 7. *ſect.* 3. allowed of, and no man ought to be wiſer than the law; and this was giving money againſt money, for which *indebitatus aſſumpſit* would not lie, but an action upon the ſpecial contract; and to ſay that becauſe he depended upon the defendant's word at firſt, he therefore ſhould have no ſpecial bail, would be a reaſon why there ſhould be no ſpecial bail in any ſimple contract: and here ſpecial bail was ordered, and it was ſaid to be ordered in like caſes in the *Common Pleas*, 12 *Mod.* 295.

In an action of debt for two hundred pounds, upon the game act of 9 *Anne*, *c.* 14. the defendant was arreſted on an affidavit, that he was indebted to the plaintiff in one hundred and fifty-one pounds four ſhillings, for money won of him at play, without mentioning how much was won of him at each time. And in *Trinity* term 10 *Geo.* 2. 1736. it was moved, that the bail-bond might be delivered up, and common bail accepted; and it was ſaid, that in actions upon penal ſtatutes ſpecial bail is never required; and this he inſiſted was the preſent caſe, the money for which the action is brought, not being due as on a contract, but given by the ſtatute to the loſer; and if he doth not ſue, to any other perſon: and therefore it is to be conſidered as a penalty.

On the other ſide it was agreed, that although it muſt be admitted, where a penalty is given to common informers, ſpecial bail is not required, yet otherwiſe it is, where it is given to the party aggrieved. And in this caſe the money ſued for is not properly a penalty, but is to be conſidered as received by the defendant for the uſe of the plaintiff, as he came by it by unlawful means. And it is like the caſes, where money is paid by compulſion, or without conſideration. If the action had been brought by an informer, the money ſued for muſt indeed be regarded as a penalty, becauſe he never had a property in it; but it makes a great difference, that here the loſer is the plaintiff: and the ſame ſtatute may in one part be remedial, and in another penal.

And

And on the ſame ſide an affidavit was produced, that one hundred and forty-nine pounds were won at one time, and ſeveral other ſums at other times, amounting to more than ten pounds at each ſitting; all which together make up the ſaid one hundred and fifty-one pounds four ſhillings; and that the money was loſt within three months before the bringing of the action. And though objected to the reading of this affidavit, as being contrary to practice, yet the court permitted it to be read, as it was explanatory only. *Such an one refuſed*, 2 *Stra.* 1157. See *Barnard. K. B.* 438.

When this cauſe was firſt argued, the court (*Lee* Chief Juſtice abſent) ſeemed divided in opinion. *Page* Juſtice was of opinion, that the plaintiff was intitled to bail, for that the act makes the money won a debt; and it has in effect enacted, that the winner owes ſo much to the loſer, 2 *Stra.* 1079. But *Probyn* and *Chapple*, Juſtices, ſeemed inclined to the contrary, becauſe here the property of the money was abſolutely deveſted; and therefore this caſe materially differs from thoſe where money is paid without conſideration: and conſequently there is no difference, as to the preſent point, between common informers and the perſon aggrieved. And *Chapple* ſaid, that it was determined in the *Common Pleas*, by the Lord Chief Juſtice *Eyre*, that if more than ten pounds is won, and no ſecurity given, the winner may, notwithſtanding the ſtatute, by an action recover the money. And *Chapple* Juſtice ſaid, he was of the ſame opinion, and that in ſuch caſes the loſer cannot recover the money back again, the act extending only to ſuch caſes where the money is paid.

However, the matter in queſtion being a new point, the caſe was then adjourned; and in *Mich.* term 11 *Geo.* 2. 1737. it was again ſtirred and argued; and (as it was reported to the reporter) it was now determined by *Lee* Chief Juſtice, and the whole court, that as the loſer is intitled by the ſtatute to an action for the money loſt, as for money received to his uſe, and the money is therein conſidered

ſidered as a debt, the act is not penal, but more properly remedial, 2 *Stra.* 1079. and therefore the plaintiff is intitled to bail. And the rule before granted to ſhew cauſe, for giving up the bail bond, was now diſcharged. *Andr. Rep.* 70. *Salk.* 100. *pl.* 10.

Cannot hold to bail upon a judgment obtained in a foreign court, or on a decree here.

Plaintiff had made affidavit that defendant was indebted to him a large ſum of money, ordered to be paid by a ſentence of the bailiff of *Mendon* in *France*, as a compenſation for not making good a charge againſt plaintiff for bigamy. Defendant had appealed to the parliament of *Paris*, and it appeared by the acts of that court, that the ſentence of the bailiff of *Mendon* was annulled, (not upon the merits, but according to the cuſtom of the ſuperior courts, who on an appeal from an inferior juriſdiction, conſtantly annul the former ſentence, and proceed as in an original ſuit;) and the queſtion was, Whether defendant ought to be held to bail or not? Lord Chief Baron *Denton*, and *Comyns*, were of opinion, that as the ſentence of the bailiff of *Mendon* appeared to be annulled, and not in force, it was not neceſſary for the court to conſider whether this ſentence, when in being, would have been a ſufficient cauſe of action to hold defendant to bail, but looking on the ſentence as diſcharged and made void; and therefore ordered a common appearance to be accepted. Mr. Juſtice *Forteſcue* was of opinion, defendant ought to be held to bail. *Barnes C. P.* 68.

Sir *John Strange* reports the ſame caſe (which he ſays was in *Mich.* term, 19 *Geo.* 2. and not *Hilary*, 10 *Geo.* 2. as *Barnes* has it) as follows, That it was an action for 2500 *l.* for a malicious proſecution recovered in the ſaid court of *Mendon*, and that the affidavit for holding the defendant to bail, was for ſo much money due to him upon a *judgment or decree*; and the court held, that did not warrant holding to bail, for upon a *decree here* there can be no bail; and whatever might be the caſe of a money debt contracted and ſued for abroad, yet this being a caſe of damages for a malicious proſecution, could never be conſtrued to raiſe a debt here: ſo common

ail was ordered. 2 *Stra.* 1243. See 2 *Vern.* 540. *l.* 484. *S. P.*

If upon examination before a judge, one do not nake out a good cauſe of action, common bail ſhall e ordered. 12 *Mod.* 526.

By *Holt* Chief Juſtice, when upon conteſt about ommon or ſpecial bail, it does appear that plaintiff ath miſconceived his action, and that if any action es, it is of another ſort, there common bail ought o be accepted. 12 *Mod.* 579.

One ſummoned before a judge, to ſhew cauſe hy common bail ſhould not be taken, did not ome; whereupon a day was given for him to come, r elſe that common bail ſhould be; he comes be- ore the day, and conſents to common bail, which as accordingly filed; and at the day came to make ath of a debt above 10*l.* but *by the court* ought not o be received, bail being regularly filed. 12 *Mod.* 24.

A joint demand will not warrant bail in ſeparate ctions. *Barnes* 64.

Action againſt maſter of a ſhip for imbeziling oods he had on board, and he was held to ſpecial ail, by *Holt*. 12 *Mod.* 257.

But if it were for negligently keeping, common ail would have done. *Ibid.*

By the court, if one has ſeveral cauſes of action, ach whereof is too ſmall for ſpecial bail, he cannot oin them to enforce ſpecial bail. *Ibid.* 527. See *Barnes* 64. *S. P.*

By *Holt* Chief Juſtice: If the declaration don't gree with the *acetiam*, there ſhall be only common ail. *Comb.* 131.

No ſheriff or other officer within the ſaid princi- In *Wales*, or the
ality, or *counties palatine*, upon any writ or proceſs *counties palatine.*
ſuing out of any of his Majeſty's courts of record t *Weſtminſter*, ſhall hold any perſon to ſpecial bail, nleſs affidavit be firſt made in writing, and filed n that court out of which ſuch writ or proceſs is o iſſue, ſignifying the cauſe of action, and that the ame is twenty pounds and upwards; and where he cauſe of action is twenty pounds, bail ſhall not be

be taken for more than the ſum expreſſed in ſuch affidavit. 11 & 12 *W.* 3. *c.* 9. *ſect.* 2.

Rule to ſhew cauſe why a common appearance ſhould not be accepted for defendant, who had been arreſted in the county palatine of *Durham*, and the ſum ſworn due, being under twenty pounds, made abſolute. For plaintiff it was urged, that the ſtatute 11 & 12 *W.* 3. *c.* 9. *ſect.* 2. requiring no ſheriff to hold to bail in counties palatine, on proceſs out of *Weſtminſter-hall* under 20*l.* was * virtually repealed by the ſtatute 12 *Geo.* *c.* 29. perpetuated by 21 *Geo.* 2. *c.* 3. which requires bail in all caſes where affidavit ſhall be made that the cauſe of action amounts to ten pounds, and the latter being a general law, and extending throughout *Great Britain*, (*Scotland* only excepted.) *Barnes's Notes C. P.* 62. *By the Court:* Affirmative words without negative ones, are not ſufficient to repeal a former law; the nature of the caſe, and the intent of the legiſlature, are to be conſidered. Both the ſtatutes have the ſame title, viz. *to prevent vexatious arreſts*; and both were made in favour of the liberty of the ſubject: they may ſtand together. In a *county palatine*, twenty pounds muſt ſtill be ſworn due to require bail. [It has been ſo held in the *Exchequer*, *Barnes's Notes C. P.* 62.] By a rule of this court, *Michaelmas* 1654, bail is required for twenty pounds, and no leſs. [See *Rules, Orders, &c. in Common Pleas, edit.* 1742.] And though the practice was introduced in Chief Juſtice *North's* time to hold to bail for 10*l.* (*Gilb. Hiſt. C. P.* 37.) yet the old rule remains undiſcharged. 2 *Barnes* 68.

On penal ſtatutes.

On a penal ſtatute, the defendant is not to be held to bail (as upon 13 *Eliz.* *c.* 5. perpetuated by 29 *Eliz.* *c.* 5. of fraudulent conveyances, ſaid to be according to the practice in *K. B. Yelv.* 53. *Dan. Abr.* 680. nor on 2 *Geo.* 2. *c.* 23. *ſect.* 26. perpetuated by 30 *Geo.* 2. *c.* 19. *ſect.* 75.) for 50*l.* penalty for defendant's practiſing as an attorney, not being duly admitted, becauſe it is for a fine or amerciament, and is in the nature of a *quitam.* *Barnes*

* 2 *Stra.* 1102.

. But defendant may be arreſted on 10 & 11
. 3. *c.* 10. for an offence in the exportation of
ol; and then, not only the penalty, but the cauſe
action, ought to appear in the writ, and de-
ndant ought not to be arreſted on a general *latitat*,
th an *acetiam billæ*, (*Com. Rep.* 75. *pl.* 48.) be-
uſe the penalty on a ſtatute is in the nature of a
e or amerciament ſet on the party for an offence
mmitted, and therefore no perſon ought to ſuffer
y inconvenience by reaſon of ſuch law, till he is
nvicted of the offence, for then he would be
ble to an action for a penalty, before it ought to
ſet. *Gilb. Hiſt. C. P.* 37. *edit.* 1761. *Bacon's*
r. 210. *pl.* 3. *edit.* 1761. So held by Lord Chief
ſtice *Holt*, 12 *Mod.* 231.

In ſlander, no ſpecial bail, except in ſlander of le, wherein to be left to the diſcretion of the judges, le of *Mich.* term 1654. 6 *Char.* 2. *K. B. & C. P.* 7. 12. *Barnes* 79, 80. 11 *Mod.* 49. *pl.* 18. In ſlander.

Motion that defendant might put in good bail to intiff's action, [This action was given by 2 *Rich.* *c.* 5. 12 *Rich.* 2. *c.* 11.] for although the action but for words, (ſee *Sid.* 183.) yet the ſame being oken againſt an Earl, the court may compel ſpe-l bail; and it was granted, *unleſs cauſe ſhewn to contrary. T. Raym.* 74. Denied in 11 *Mod.* . *pl.* 18. though the words were very bad, and plied treaſon. 3 *Mod.* 41. 2 *Mod.* 215. In *ſcandalum magnatum.*

In an action on the caſe for calling a woman of ality whore, whereby ſhe loſt her marriage, it s ruled on motion, that the defendant ſhould find cial bail; though generally in actions for words, ſpecial bail is uſual, yet on the circumſtances of caſe, the court may compel the defendant to find cial bail. *Lev.* 39.

It was moved to have leave for charging *M.* being ſoner in *Newgate*, with a *ſcandalum magnatum & tiam billæ* of 100*l.* in order to hold him to ſpe-l bail, for ſaying the *D.* of *S.* was a cheat, and had eated the King and the army. *Holt:* This being oor man, to charge him thus, will be a perpe-

tual

tual impriſonment to him; and ſpecial bail has been often demanded in theſe actions, yet it has been frequently denied. But he was ordered to find two that would ſwear themſelves worth twenty-five pounds each, and himſelf bound in one hundred pounds. 12 *Mod.* 420. *Holt* 640.

In actions on judgments.

In all caſes where a priſoner in the *Fleet*, or other gaol or priſon is diſcharged, or ordered to be diſcharged by the court of *Common Pleas*, or any of the juſtices thereof, by *ſuperſedeas*, for want of proſecution, and ſuch priſoner be afterwards arreſted, or detained in cuſtody by action of debt, brought upon judgment obtained in the cauſe wherein ſuch priſoner was ſo diſcharged; a common appearance ſhall be accepted for defendant in ſuch action of debt upon judgment. *Rule* 2. *of Hil. term* 8 *Geo.* 2. 1734.

Debt upon a bond, *non eſt factum* pleaded, and verdict and judgment for plaintiff to a *ſcire facias*. On this judgment the defendant pleaded bankruptcy, but the judgment was after; and the judge who tried the cauſe being of opinion againſt defendant, there was a verdict for plaintiff. And now in an action of debt upon the judgment, motion that defendant might be diſcharged upon common bail, becauſe the bond, which was the foundation of the demand, was before bankruptcy; *but not allowed.* For, *by the court*, We can look no farther backward than the judgment, and therefore there muſt be bail. *Str.* 477.

Defendant, after judgment, ſurrendered himſelf in diſcharge of his bail, and lay two terms without being charged in execution; during which time the plaintiff brought an action of debt upon the judgment, and after a recovery in that action, defendant lay two terms more without being charged; and plaintiff brought another action of debt upon the ſecond judgment, whereupon the defendant moved for a *ſuperſedeas* as to the two firſt actions, and that common bail might be accepted in the laſt; and upon conſideration, both were granted. It was agreed, that in the firſt action of debt on judgment

ſpecial

ecial bail might be required, but the court ſaid it ould be a handle of oppreſſion, if they carried it y farther. 2 *Stra.* 782. *Barnard. K. B.* 22.

An action of debt was brought upon a judgment ter a writ of error, and bail put in thereupon; but bail was given in the original action: and the eſtion was, Whether bail being put in upon the rit of error, defendant ought to be held to bail in e action on the judgment? Urged for defendant, at according to the courſe of the court, where bail given in the original action, no bail is required in e action on the judgment; and the bail in error, o are bound for debt and coſts, and cannot ſur- nder the principal, are a better ſecurity than bail the original action. *By the court:* No inſtance be ſhewn, where bail put in on a writ of error been held ſufficient to excuſe bail in an action debt upon a judgment. Defendant was held to l. It was ſaid by *Chapple* for plaintiff, who oted *Sid.* 294. *pl.* 15. 2 *Keb.* 53. *pl.* 12. *id.* 70. 45. that in caſe the writ of error ſhould be *non 'd* for want of tranſcribing the record, the bail uld not be liable; but the law is otherwiſe, and bail being found to proſecute the writ of error h effect, are liable in caſe of a *non pros.* *Barnes Com. Rep.* 556. *Pract. Reg. C. P.* 57.

Bail in an action of debt on judgment diſcharged, re being bail in the original action, and plaintiff refore not intitled to bail on the judgment. 2 *rnes* 93.

If there was bail in the original action, then no is required in the action upon the judgment; but o bail in the original action, then bail is to be in, where the debt is above 10 *l.* (the money re- ered) and an affidavit made thereof. *Rep. and . of Pract. in C. P.* 32, 77. *Pract. Reg. in C.* 54, 56. but ſee *Rule* 2. *of Hilary Term* 8 *Geo.* 2. 4. *in C. P.*

The defendant had been diſcharged out of cuſtody, not having been taken in execution in due time; now the plaintiff brought debt upon the former gment: upon which it was moved, that the de-

fendant might be admitted to common bail. But the court refuſed the motion, by reaſon that this was not the ſecond action brought on the judgment, but the firſt; and for this purpoſe Judge *Lee* mentioned the caſe of *Chambers* and *Robinſon*, 2 *Stra.* 782. *Barnard. K. B.* 22. However, afterwards the court made a rule to ſhew cauſe. 2 *Barnard. K. B.* 369.

On cauſe ſhewn, it was ſaid, that if this had been the ſecond action upon the judgment, defendant muſt have been diſcharged upon common bail; but as it is only the firſt, it was conceived that ſpecial bail was due. For this purpoſe the caſe of *Townſend* and *Maſon*, 1724. was mentioned, where Judge *Raymond* refuſed to diſcharge a defendant at his chambers, upon common bail, under the ſame circumſtances, the court was of the ſame opinion; accordingly the rule was diſcharged. *Id.* 405.

Action on a judgment obtained againſt defendant for nine pounds debt; and the debt, with the addition of coſts, amounting to more than 10*l.* defendant was arreſted. And it was moved, that defendant might be diſcharged out of cuſtody on filing common bail, and cited *Clever* and *Jordan*, *Hilary term* 8 *Geo.* 2. where debt was brought on a judgment, in order to prevent defendant's taking advantage of the Lords act, which he might have done upon an execution; and the original debt, with the coſts, (but not without) amounting to more than ten pounds, defendant was arreſted, and put in bail, and afterwards was ſurrendered in diſcharge of his bail: and after that he was ordered to be diſcharged out of cuſtody, on filing common bail. *Andr.* 15.

It was admitted on the other ſide, that where the original debt doth not amount to 10*l.* but with the coſts amounts to more, defendant is not obliged to put in ſpecial bail: and ſo it was determined in the caſe of *Gammag* * againſt *Watkins*, *Eaſter* term 7 G

* The debt was three guineas, but the coſts ſwelled it to 14*l.* 10*s.* for which plaintiff had judgment, and defendant brought a writ of error. Plaintiff brought debt upon

Geo. 2. and † another caſe ſince. But he argued, hat here bail being put in above, and defendant hav- ng voluntarily ſurrendered himſelf, [and ſo it was worn] it is too late for him to pray a diſcharge. And he likened it to the caſe of an executor, who in writ of error put in bail, which he was not obliged o do; and afterwards it was moved to diſcharge he bail, but denied. 2 *Lord Raym.* 1459. 2 *Stra.* 45.

By the Court (Lee Chief Juſtice abſent): it is moſt robable that the bail below put themſelves in as bail bove, and afterwards ſurrendered the defendant. ut ſuppoſing it was all the defendant's own act, it nakes no difference, the whole being compulſory, s it aroſe from the wrongful proceeding at firſt. Ie ought therefore to be diſcharged; and this is the onſtant practice, where the debt for which the dgment was obtained is under 10*l.* And a rule as granted accordingly. *Andr.* 15. 2 *Stra.* 1077.

Motion for a ſpecial *Latitat*, with an *Acetiam*, In treſpaſs. here the party intended to declare in treſpaſs only, pon a ſurmiſe of there being great mayhem; and he court ſaid, that upon affidavit thereof, they would ake one with an *Acetiam*, and ſo there ſhall be ecial bail: which note, *Sid.* 276. *pl.* 4. See *Gilb. Hiſt. C. P.* 36, 37.

pon the judgment, and held defendant to bail; and, up- n motion, proceedings were ordered to ſtay, pending the rit of error, and common bail to be accepted: for as the riginal demand did not require bail, the additional coſts ill not alter the caſe. 2 *Stra.* 975. *Andr.* 16 *in notes.*

† Defendant was ſurrendered by his bail after judg- ent, and lay two terms without being charged in execu- on; after this he ſuperſeded himſelf, and then plaintiff rought debt upon the judgment; and the court held, that ommon bail only ſhould be required, it being plaintiff's wn laches, not to detain him when he might: and it was id to have been ſo ruled in the ſaid caſe of *Clever* againſt *ordan*, and to be the conſtant practice in the *Common leas.* 2 *Stra.* 1039.

In treſpaſs, bail is at the diſcretion of the court. *Barnes* 79, 80. See *Rule of Mich. term* 1654. *ſect.* 12. 6 *Char.* 2. *Trin.* 24 *Eliz.* 1583. 2 *Keb.* 101. *pl.* 28.

Motion for common appearance. Plaintiff's affidavit ſet forth, that defendant entered plaintiff's hop-ground, and did take and carry away ſeveral thouſand hop-poles, to his damage 20*l.* Court ſaid, The act of 12 *Geo. c.* 29. (perpetuated by 21 *Geo.* 2. *c.* 3.) did not diſtinguiſh actions, but plaintiff might hold to bail in treſpaſs, as well as any other action. *Caſ. of Pract. C. P.* 106. *Pract. Reg. C. P.* 64. and alſo declared there was no occaſion to have a Judge's order. *Barnes* 55.

Aſſault and battery.

By rule of *Mich.* term 1654. motion for ſpecial bail, upon an affidavit that the cauſe of action was battery and wounding, and that there were ſeveral wounds given by a ſword, whereby plaintiff was in danger, *&c.* And it was ſaid, that ſpecial bail was granted about ten years ago, upon a like motion in the caſe of *Paiton*, in which one was hung up upon a tenter-hook in *Butcher-row*, in the night; and it was doubted whether it could be granted, ſince the ſtat. 13 *Char.* 2. *ſtat.* 2. *c.* 2. concerning *Latitat and Bail*; and it ſeemed that it might, becauſe it was ſaid that the ſtatute was intended to prevent oppreſſion in the country, by requiring exceſſive bail: therefore they ordered defendant to give ſpecial bail. *Sid.* 307. *pl.* 10. No ſpecial bail of courſe in battery, but muſt be applied for and obtained by ſpecial motion and order. *Ibid. Rule of Mich.* 6 *Char.* 2. 1654. *K. B. C. P.* See *Gilb. Hiſt. C. P.* 37.

Lord Chief Juſtice *Holt* ſaid, When people come to him for bail, they muſt be content with bail of reaſonable value, and not inſiſt upon their worth in proportion to the ſum charged. 6 *Mod.* 266. And he wiſhed attornies would beware of charging extravagant *acetiams*, for otherwiſe an action of the caſe would lie for holding to exceſſive bail. *Ibid.* 267. 12 *Mod.* 257, 273. 2 *Keb.* 101. *pl.* 28, 106. *pl.* 4.

Special

Special bail in battery, for putting an arm out of joint, denied. *Mod.* 2. Granted for a foul battery againſt a man and his ſervant. *Comb.* 57.

Holt Chief Juſtice ſaid, When people came to him for leave to charge with *acetiams*, in caſes of outrageous batteries, he would give leave to charge with a good ſum. 6 *Mod.* 266. Court refuſed to hear affidavits againſt an outrageous battery, being only to prevent ſpecial bail. 2 *Keb.* 108. *pl.* 46.

In debt, bail is of courſe. *Rule of Mich. term* 1654. *ſect.* 12. 6 *Char.* 2. *Trin.* 24 *Eliz.* 1582. *Barnes* 80. See 10 *Mod.* 24. In an action upon a replevin bond, common bail ſhall be filed. *Salk.* 99. *pl.* 8. *Carth.* 519. *Holt* 127. 12 *Mod.* 320, 380. but *S. P.* does not appear in any of them. In debt.

In *detinue*, bail is at diſcretion. *Same Rules.* *Barnes ibid.* Detinue.

In a ſpecial action on the caſe, bail at diſcretion. *Same Rules.* *Barnes. ibid.* Special action on the caſe.

In conſpiracy, no ſpecial bail of courſe, without ſpecial motion and order. *Rule of Mich. term* 1654. *ſect.* 12. 6 *Char.* 2. *K. B. & C. P.* *Barnes* 74. Conſpiracy.

Judge at his chambers will order ſpecial bail, if he thinks fit, which defendant has a right to apply to the court to get diſcharged, if not well founded. *Barnes* 48.

In an action of conſpiracy, *Offley* prayed ſpecial bail on a malicious indictment, to charge plaintiff as ſpiriter of children, defendant being going beyond ſea, which the court refuſed, being a bare conſpiracy. Albeit, in the *Exchequer*, in *Adam*'s caſe, it was granted, he being impriſoned four months for ſuſpicion of treaſon, and diſcharged by the King and council. 2 *Keb.* 796.

In falſe impriſonment, no ſpecial bail of courſe, without ſpecial motion and order. *Rule of Mich. term* 1654. *ſect.* 12. 6 *Char.* 2. *K. B. & C. P.* *Barnes* 74. Falſe impriſonment.

"In caſe any tenant for life or years, or other perſon, who ſhall come into poſſeſſion of any lands, tenements, or hereditaments, under or by colluſion with ſuch tenant, wilfully hold over after the determination Tenants holding over after demand to pay double rent, may be held to ſpecial bail.

termination of ſuch term, and after demand made in writing for delivering the poſſeſſion thereof by the perſon to whom the remainder or reverſion ſhall belong, or his agent; ſuch perſon holding over ſhall pay double the yearly value of the lands, &c. ſo detained, to be recovered by action of debt, whereunto the defendant ſhall be obliged to give ſpecial bail, againſt which penalty there ſhall be no relief in equity." *Stat.* 4 *Geo.* 2. *c.* 28. *ſect.* 1.

In ejectment. Motion in treaſury for bail in an action for meſne profits, after a recovery in ejectment upon the leſſor of the plaintiff's affidavit, that the meſne profits amounted to 89 *l.* Bail ordered for 80 *l.* This is a cauſe of action which is bailable, or not, at the diſcretion of the court, or a judge. *Barnes* 88. *Pract. Reg. C. P.* 62. *S. P.*

Defendant held to bail by a judge's order, in an action for meſne profits, after judgment in ejectment againſt the caſual ejector by default, diſcharged by plaintiff's conſent on common appearance, the *ac etiam* being in caſe inſtead of treſpaſs only. 2 *Barnes* 59. It was obſerved *by the court*, that theſe actions for meſne profits (which are grown very faſhionable) tend to create double expence. Why ſhould not plaintiff be ready at the trial of the ejectment, to prove his damages, which may be recovered in that action, without bringing a ſecond for meſne profits? The true rule as to the time from which meſne profits are to be recovered, ſeems to be where judgment is againſt the caſual ejector, from the time of the delivery of declarations to the tenants in poſſeſſion, or from the time of an actual demand of poſſeſſion proved, where judgment is againſt the tenants in poſſeſſion (or the landlord defending in their ſtead) from the *ouſter* admitted by the common conſent rule; but in neither caſe from the demiſe, which may be laid back at plaintiff's pleaſure. 2 *Barnes* 59. See *id.* 367.

In covenant. In an action of covenant, defendant is not bound to put in ſpecial bail, unleſs plaintiff has obtained a rule of court, or an order from a judge for that purpoſe, or unleſs the covenant be for payment of mo-

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ey, until declaration. Rule of *Mich.* term 1654. ct. 12. 6 *Char.* 2. 12 *Mod.* 30.

Motion for bail upon a writ of error in an action f debt upon bond; conditioned for payment of oo *l.* mentioned in a ſurrender of a copyhold by ay of mortgage, and not for performance of cove- ants, wherein judgment had paſſed by default. *By e court*, there muſt be bail. This caſe is out of he ſtatute 16 & 17 *Char.* 2. *chap.* 8. (revived and ade perpetual by 22 & 23 *Char.* 2. *c.* 4.) but ithin the ſtatute 3 *James*, *chap.* 8. (revived and ade perpetual by 3 *Char. chap.* 4. *ſect.* 4.) *Barnes* 8.

In debt upon bond to perform covenants, no bail all be given, but with reſpect to the breaches, and he damage done thereby. *Sid.* 63. *pl.* 38. *Noy's ep.* 88. *Lev.* 300. And the meaſure of that ſhall e taken from plaintiff's oath. *Salk.* 100. *pl.* 11.

Action of covenant brought by plaintiff, patentee f *Drury-lane* playhouſe, againſt defendant for not erforming dances upon the ſtage according to arti- les, whereby plaintiff ſwore himſelf damnified 100 *l.* efendant moved in the treaſury for a common ap- earance, but did not obtain a rule, the plaintiff aving ſworn to a certain damage. *Barnes* 58.

Plaintiff ſwore that defendant covenanted to pay im 315 *l.* for the purchaſe of land; that he had een always ready to convey the eſtate on payment f the purchaſe money, but defendant refuſed, where- y plaintiff ſwears himſelf damnified 40 *l.* Common ppearance ordered. No previous application to a udge. Damages uncertain. Old caſes are not to e followed, where damages can be reduced to a cer- ainty; as in covenant of payment of money, or here a tenant covenants with his landlord to pay certain ſum for every acre of land he plows up, or he like, plaintiff is intitled to bail, otherwiſe not, ſpecially without a judge's order previous. It is ot reaſonable that defendant ſhould be held to bail or ſuch damages as plaintiff fancies he has ſuſtained, nd is pleaſed to ſwear to. 2 *Barnes* 94. So in n action on bond to ſave harmleſs, plaintiff muſt

ſwear *poſitively* and *certainly*, how, and for how much he is damnified; the court cannot take it by implication. 2 *Barnes* 97.

In an action of covenant, plaintiff made affidavit that defendant was his tenant, and that he had broke ſeveral covenants in his leaſe, to his damage of 100 *l.* and thereupon held him to ſpecial bail. Moved that defendant might be diſcharged on common bail; becauſe the damages were merely uncertain, and plaintiff had obtained no order of a judge, whereby ſpecial bail was required. In covenant for rent he did agree it was otherwiſe. Accordingly a rule was made to ſhew cauſe; and afterwards it was made abſolute. 2 *Barnard. K. B.* 325.

Defendant was held to bail in an action for the penalty of 100 *l.* for not delivering goods of 300 *l.* value, within a certain time, purſuant to agreement in writing. 2 *Barnes* 56.

In *trover.* Bail in *Trover* by *acetiam* is of courſe. *Barnes* 80.

It was held that upon a proper affidavit the writ may be marked for bail in *Trover*, without order of the court, or of a judge at his chambers; for it is more an action of property, than a *Tort*. 2 *Stra.* 1192. 6 *Mod.* 14.

Plaintiff brought an action of *Trover* againſt defendant in *Poultry Counter* in *London*, for goods of great value. Defendant removed the cauſe by *Habeas Corpus* into *King's Bench*. And he moved there to be diſcharged upon common bail; becauſe he ſeized theſe goods as judge of the admiralty in *Penſylvania*, they being condemned there by ſentence; and the ſaid ſentence affirmed here upon appeal by Sir *Charles Hodges*. The plaintiff made affidavit of the value of the goods to be 100 *l.* And by *Holt* Chief Juſtice, the practice is, that if the plaintiff does not ſhew his cauſe of action upon ſummons, the defendant ſhould be diſcharged upon common bail, notwithſtanding that the cauſe is removed from an inferior court. 12 *Mod.* 526. Now here the defendant, having acted as judge, is not liable to an action. But bail was ordered to be put in for 500 *l.* becauſe

ecauſe if the defendant acted as a judge, he will be ut of danger of any action; but if he did not act as judge, then it was very reaſonable that ſpecial bail ould be put in. 2 Ld. *Raym.* 767.

An action of *Trover* was brought by the preſent laintiff againſt one *Maſon*, wherein he obtained dgment by default, and afterwards had final judgnent; whereupon a writ of error was brought, nd another action of *Trover* was now brought by he ſame plaintiff, and for the ſame goods for which he firſt action was brought againſt *Broughton*. It as hereupon moved, on an affidavit that the goods onverted amounted to more than 10 *l.* that the dendant might be held to ſpecial bail. And it was ompared to the caſe of an indorſee of a bill of exhange, who may bring an action both againſt the rawer and indorſor, and hold them both to bail. nd *Stra.* 515. was cited, where upon a motion to ay proceedings, it was held, that an indorſee of a ill of exchange may bring an action thereon, both gainſt the indorſor and drawer; and the court is ony to ſee, that the plaintiff hath but one ſatisfaction. o here the plaintiff may ſue both *Maſon* and the reſent defendant, and is intitled to the ſame proceſs gainſt the laſt, as if the action had been brought gainſt him only. And it was urged, in anſwer to n objection made by *Page*, juſtice, that by a judgnent obtained by the plaintiff in *Trover*, the goods re become the defendant's; that a ſpecial property nly is thereby veſted in him: and in the preſent aſe, it is evidence only of a property, as between he plaintiff and *Maſon*, but not as between the preent parties.

But by the court (*Lee*, chief juſtice abſent): the roperty of the goods is intirely altered by the judgnent obtained againſt *Maſon*, and the damages reovered in the firſt action are the price thereof; ſo hat he hath now the ſame property therein as the riginal plaintiff had; and this againſt all the world. nd therefore the motion was denied. It was urged or the defendant, that the plaintiff is not intitled

to

to ſpecial bail, becauſe then he would have bail upon bail. *Andr. Rep.* 18. 2 *Stra.* 1078.

An account. In account, plaintiff inſiſted on ſpecial bail, becauſe defendant would go beyond ſea; but denied by the court; for in account no ſpecial bail is to be found, till judgment. *Pract. Reg. C. P. quoad computet*, 2 *Rol. Rep.* 53. *Lev.* 300. *Keb.* 99. *pl.* 93. 2 *Keb.* 335. *Noy Rep.* 28. *Ventr.* 103. where the ſpecial bail was diſcharged, and ſaid that if plaintiff would have ſpecial bail, he muſt arreſt defendant again in an action on the caſe.

In *aſſumpſit*. In *aſſumpſit* bail is of courſe. *Barnes* 80.

For criminal converſation. Defendant was held to bail by lord chief juſtice's order, upon affidavits of a criminal converſation with plaintiff's wife. Defendant afterwards applied to lord chief juſtice, upon affidavits of himſelf and plaintiff's wife, that plaintiff having been long beyond ſeas, and the wife having had advice of his death, received defendant's addreſſes, and married him as her ſecond huſband; lord chief juſtice ordered defendant to apply to the court, and upon reading affidavits, and hearing counſel on both ſides, the chief juſtice was of opinion, that the order for bail ought to be diſcharged, nothing criminal appearing in the defendant; and in caſes of this kind, which differ from actions brought upon contracts, no bail is required, unleſs by the ſpecial order of a judge, which defendant hath a right to apply to the court to diſcharge, if not well founded. *Forteſcue* and *Reeve* juſtices thought that entering into the foundation of the order, was examining the merits of the cauſe; and therefore improper before the trial. Defendant was held to bail, and had four days time to put in the ſame; (*Denton* juſtice abſent.) *Barnes* 47. *Pract. Reg. C. P.* 63.

Moved for a ſpecial *acetiam* in treſpaſs, for lying with the plaintiff's wife, which was granted; and held the defendant to 50 *l.* bail.

N. B. Affidavits were produced of the indecent liberty they took together. 11 *Mod.* 275. *pl.* 24.

For a malicious proſecution. Bail ordered for 200 *l.* in an action for a malicious proſecution for forgery, upon plaintiff's affidavit.

Defendant

efendant moved for a common appearance; and it ppearing that the plaintiff was not acquitted of the dictment upon the merits, but upon a flaw, and o precedent being produced of an order for bail in ch an action as this, (though for falſe impriſonent there was) the rule to ſhew cauſe, why a comon appearance ſhould not be entered, was made bſolute. *Barnes* 74. *Rep. and Caſ. of Pract.* 148. *ract. Reg. C. P.* 66.

Plaint was levied in an inferior court before a ebt contracted, and an arreſt upon a proceſs upon e plaint adjudged ill by the court. 7 *Mod.* 55. Before the debt is contracted.

The defendant covenanted to pay to the plaintiff ſum of money on the 24th of *June*; whereupon e plaintiff takes out a *latitat*, teſted the 3*d* of *May*, returnable the laſt day of *Trinity* term follow-g, and arreſted the defendant upon it: which be-g made appear to the court, they diſcharged the reſt: for though it is allowed a man may take out *latitat* before the money is due, yet the party muſt ot be arreſted upon it. 8 *Mod.* 343. *Barnard. B.* 57. And this differs from an original, which it be teſted before the money due, it is abateable; t the *latitat* is only to bring him into cuſtody, at the plaintiff may declare againſt him by bill, d after that the proceedings upon the *latitat* ceaſe. By the cuſtom of *London*, the debtor may be arſted before the money is due, to make him find reties.) 8 *Co.* 126. *Hardr.* 303. *Hob.* 86. 11 *en.* 6. 3. *Bohun's Priv. Lond.* 79. Edit. 1723. was alſo moved, that the defendant might have ſts, being put to the charge of motions to be diſarged; but the court would grant none, it being t for taking out of the proceſs of the court. *nt.* 28. Before the money is due.

In treſpaſs and falſe impriſonment, the defendant ſtifies by arreſt on *latitat*; to which the plaintiff plied, that the writ was taken out after the arreſt; which the defendant demurred; and *by the court*, e antedate of the writ will not ſuffice, if the proedings be after, as in *Harriſon*'s caſe, an obligation ot to proſecute before *Eaſter* term; the defendant ſaid, Before a writ is ſued out.

ſaid, he did not; the plaintiff replies, that he ſued forth a writ returnable in *Eaſter* term, teſted in *Hilary* term; to which he appeared: to which the defendant rejoined, that he ſued forth the writ after the beginning of *Eaſter* term, which he is eſtopt to do, the firſt writ being his own, and the appearance is to that writ, therefore, though proſecuted by another in his name, is not avoidable; and for the ſame reaſon he is concluded to ſay, that he ſued it out after *Eaſter* term. But a ſtranger is not concluded to ſay, the writ was ſued out after; and ſo here, eſpecially the *latitat* being not ſuable with any other *teſte* than of the precedent term; but an original may be teſted at any: and judgment for the plaintiff, *niſi*. 3 *Keb. Rep.* 213. *pl.* 21.

In treſpaſs of aſſault and impriſonment, the defendant as bailiff of the ſheriff juſtified by *latitat*, teſted the 27th of *June* in *Trinity* term; the plaintiff replied, that the ſaid writ was ſued out on the 9th of *Auguſt*, which was after the arreſt of the plaintiff; to which the defendant demurred; and judgment prayed for the plaintiff: But *by the court*, this is an eſtoppel, eſpecially in caſe of a bailiff, whoſe warrant might be before the arreſt, and all writs muſt be teſted as of term; and the ſheriff's not returning the writ, or not having any, ſhall not prejudice his under-bailiff; but *by the court*, a good action will lie againſt the ſheriff, or a bailiff of a franchiſe; and it was adjourned. 2 *Keb.* 173. *pl.* 56, 198. *pl.* 25.

Without a writ. "If any ſheriff, or other perſon, having authority to execute writs, make any warrant for the ſummons of any perſon, as upon any writ or ſuit, or for the arreſt or attaching of any perſon by his body or goods, to appear in any of the courts at *Weſtminſter*, or elſewhere, (not having before that, the original writ or proceſs warranting the ſame) upon complaint thereof to the juſtices of *aſſize* of the county, or to the judges of the court out of which the proceſs iſſued, not only the party who made ſuch warrant, but the procurers thereof, ſhall be ſent for by attachments, or otherwiſe, as the judges ſhall think good, and be examined upon their oaths; and

and if the offence be confeſſed, or proved by witneſſes, the judges ſhall commit the offenders to the gaol of the county or court, where the ſame ſhall be examined, until they have ſatisfied the party grieved, not only the ſum of 10*l.* but alſo all ſuch coſts and damages as the judges ſhall ſet down, that the party hath ſuſtained thereby, and 20*l.* a-piece for their offence to the King." Stat. 43 *Eliz. c.* 6. *See Rule of* 1654. *ſect.* 2. *Hilary* 14 & 15 *Char.* 2. *Rule* 1. *Note*; The ſaid rule literally was again in *Trinity* term, 1 *Jam.* 2. ſigned by the following judges, *Jones*, *Charlton*, *Levinz*, and *Street*.

And by the ſtat. 6 *Geo. c.* 21. *ſect.* 53. "No high-ſheriff, under-ſheriff, their deputies or agents, ſhall make out any warrants, before they have in their cuſtody the writs upon which ſuch warrants ought to iſſue, on forfeiture of 10*l.* And every warrant, to be made out upon any writ out of the *King's Bench*, *Common Pleas*, or *Exchequer*, before judgment, to arreſt any perſon, ſhall have the ſame day and year ſet down thereon, as ſhall be ſet down on the writ, under forfeiture of 10*l.* to be paid by the perſon who ſhall fill up or deliver out ſuch warrant." *Same ſtatute*, *ſect.* 54.

Twice for ſame debt.

An attorney of the *Common Pleas* brought an action againſt another, whereupon he was arreſted in the country, and when he came to *London*, the attorney cauſed him to be arreſted again in *London* for the ſame debt; and this was ſhewn to the court, and the attorney called, to whom *Anderſon* ſaid, "If a man be ſued here for a debt, and after be arreſted in another court for the ſame debt, the penalty is fine and impriſonment: and that is both the law and cuſtom of this court." And ſo the attorney was committed to the *Fleet*. *Goldſb.* 30.

If a defendant ſhall be lawfully delivered from an arreſt upon any proceſs, the ſame defendant ſhall not be again arreſted at the ſame time by virtue of any proceſs, at the ſuit of the ſame plaintiff; and if any attorney or plaintiff ſhall offend in the premiſſes, the name of ſuch attorney ſo offending ſhall be ſtruck out of the roll of attornies, and as well the ſaid attorney

torney, as the plaintiff in the ſaid proceſs named, ſhall be reſpectively puniſhed, as to the court ſhall ſeem juſt. *Rule 2 of Mich. term* 1663, 15 *Char. 2. K. B.* See *Barnes* 50.

The affidavit to hold to ſpecial bail being defective, common bail was ordered; and thereupon the plaintiff on the 19th of *April* made a full affidavit, and took out a new writ, and held the defendant to bail: and the next day, the 20th of *April*, moved to diſcontinue upon payment of coſts. And, *by the court*, the plaintiff has been too quick, for he ſhould have had the coſts taxed and paid before he took out a new writ: therefore let the plaintiff pay him his coſts of this application. 2 *Stra.* 1209.

In debt upon a bond for 900*l.* the defendant put in bail, who juſtified in court, and were allowed. The plaintiff, finding they were forſworn, and worth nothing, diſcontinued; but before he had done ſo, he arreſted the defendant in a ſecond action, and held him to bail, according to the above caſe, and obtained a rule to ſhew cauſe; when the whole villainy appearing, the court diſcharged the rule, and ſaid, *the plaintiff was right in laying hold of him as he did*; for had he diſcontinued before, the defendant would probably have run away. And therefore ordered he ſhould be held to ſpecial bail. 2 *Stra.* 1216. See 2 *Barnard. K. B.* 396. *Supplem. to Lil. Abr.* 11, 12.

The defendant had been diſcharged out of cuſtody by a judgment in one of the courts of *Ireland*, upon an act of parliament that paſſed laſt ſeſſions there, for ordering poor priſoners to be releaſed out of cuſtody. Notwithſtanding which he was ſince arreſted here by the ſame perſon, and for the ſame cauſe of action. Upon which it was moved, that this court would diſcharge him upon common bail; for that he ſubmitted it, this court would pay regard to the judgments in all foreign countries whatſoever. The court ſaid, This was a proper rule in the admiralty juriſdictions, becauſe that law is in all places the ſame. But the municipal laws of diſtinct countries vary, and therefore they would not ſay whether

there

here was any method, that could be taken in this ingdom, to make that judgment credited here. However, this they ſaid was certain, that the de-endant could not be diſcharged on motion upon , for till the late acts of 2 *Geo.* 2. *c.* 20, 22. [long nce expired] that paſſed here, they could not have one that in any ſuch caſe, and that act does not ex-end to any caſe out of *England.* Accordingly the Motion was refuſed. *Barnard. K. B.* 420.

" If any man ſhall maliciouſly (for vexation and rouble) cauſe or procure any perſon to be arreſted or ttached, to anſwer in the courts of *King's Bench*, *Marſhalſea*, *&c.* or in any of the ſaid courts, at the uit of any perſon, whereas there is none ſuch, or ithout the conſent and agreement of the party at hoſe ſuit ſuch arreſt or attachment is procured, the arty ſo cauſing or procuring the ſame, and thereof onvict by indictment, or preſentment, the teſtimony f two or more witneſſes, or other due proof, ſhall ffer ſix months impriſonment without bail, and all not be enlarged till he hath ſatisfied the party rieved his treble damages; and beſides, ſhall forfeit nto the party in whoſe name the action is brought f he be known) 10*l.* to be recovered, as alſo the id treble damages, by action of debt, bill, or plaint, any court, againſt the party ſo offending, his ex-cutors or adminiſtrators, in which no eſſoin, *&c.* all be allowed." 8 *Eliz. c.* 2. *ſect.* 4. At the ſuit of a perſon unknown, or without plaintiff's conſent.

The queſtion was, How this proof ought to be in n action upon the ſtatute, whether by collateral roof *before?* And it was held, that the proof ſhall e in the ſame action, and not in any other courſe. Wherefore this exception being taken after verdict, was adjudged to be well enough brought; and dgment for plaintiff. *Cro. Jam.* 188. *pl.* 11. *Id.* 31. See 10 *Ed.* 4. 11.

This caſe was cited in *Lutw.* 441. where in debt, e condition of a bond was to pay 200*l.* *upon due oof of breach of any part of the articles*; and it was iſted that there ought to have been proof of the each of ſome of the articles *before* the action was ought, *but not allowed*; for the proof may be in

this ſame action; and the plaintiff had judgment by opinion of all the court.

In an action on this ſtatute, the plaintiff declared that defendant cauſed him to be arreſted at the ſuit of *A. B. C.* and *D.* where *B. C.* and *D.* never conſented to it, and that was for vexation, none of them having cauſe of action. *Wray* and *Gaudy* juſtices held this out of the ſtatute, but the other juſtices *within it*; for one of the parties has colour, and may give ſufficient authority to arreſt him: and it cannot be ſaid to be maliciouſly done. But the ſtatute being miſrecited, it was for that cauſe principally adjudged, that the plaintiff *take nothing by his bill.* *Cro. Eliz.* 236. *pl.* 1.

An action on this ſtatute was brought in *C. B.* but this was held by the whole court not to be within the ſtatute; and therefore judgment was given for the defendant. *Lutw.* 166, 169.

Caſe on this ſtatute for proſecuting a ſuit againſt the now plaintiff, in the name of the defendant and *J. S.* without the knowledge of *J. S.* and in which the now defendant was nonſuited. The jury found the proſecution malicious. It was argued whether the action lay, but adjourned. 2 *Sid.* 162. *S. C.* cited *Raym.* 135. by *Twiſden* J. (who was counſel for the plaintiff in the ſaid cauſe) as reſolved that the action lies for ſuch indictment, but that the judgment was afterwards reverſed in the *Exchequer* chamber, but ſaid it ſeemed a hard caſe, if the action ſhould not lie. *S. C.* cited by *Holt* Chief Juſtice, in delivering the opinion of the court, 5 *Mod.* 40[illegible] and ſays, it is true that the judgment was reverſed but that it was not becauſe the action would not lie but becauſe he was not indicted of any offence within in the ſtatute, as appeared upon the fact, as ſet forth in the indictment. So that if he had been convicted he could have incurred no damage, for the court would have arreſted judgment. *S. C.* cited by *Holt* Chief Juſtice, as from a manuſcript report of *Brideman* Chief Juſtice, which ſays the reaſon of the reverſal was, becauſe the indictment was for no offence at all; for, in fact, *Preſcott* arreſted *Chandler*

laine in his own name, and the name of *J. S.* for a debt due to them jointly, which was lawful, without the conſent of *J. S.* And if *J. S.* did not appear, if it were in a perſonal action, he might be nonſuit; or if in a real action, he might be ſummoned and ſevered: and therefore it was held to be no offence. Lord *Raym. Rep.* 380. *S. C.* cited thus, *viz.* *A.* was indebted to *B.* and *C.* and *B.* without the knowledge of *C.* takes out proceſs in both their names againſt *A.* who afterwards proſecuted *B.* upon the ſtatute for ſo doing, but *B.* was acquitted, and then he brought an action on the caſe againſt *B.* for this malicious proſecution; but adjudged that it would not lie, becauſe he might have demurred to the action on the ſtatute, for the caſe was not within the ſtatute; and ſo it was his own fault that he was put to charges by the trial. *Carth.* 417. *S. C.* cited by *Parker* Chief Juſtice, in delivering the opinion of the court. 10 *Mod.* 217. *Hil.* 12 *Ann.* takes notice that the Lord Chief Juſtice *Holt*, in his excellent argument upon the caſe of *Savil* againſt *Roberts*, *Salk.* 15. (ſee 10 *Mod.* 148, 214. *Gilb. caſ.* 179, 185. *Sir William Jones* 93.) where he gives the reſolution of the court, ſeems unwilling to deny this caſe to be law, though he might.

After a nonſuit, or *ſuperſedeas*.

Defendant ſuperſeded by ſurpriſe, without plaintiff's knowledge, may be arreſted again for ſame debt. *Barnes* 50. No bail in an action of debt upon a judgment againſt a priſoner diſcharged by *ſuperſedeas* for want of proſecution. *Rule* 2 *of Hil. Term*, 8 *Geo.* 2. 1734. *C. P. Mod.* 25. *pl.* 68. *Keb. Rep.* 582. *pl.* 116. *March* 157. *pl.* 227. *Stra.* 1039. See *id.* 1218.

Upon a motion in this caſe, *Holt* Chief Juſtice ſaid, that he had known it held by the court, that where the plaintiff was nonſuited for want of a declaration, and afterwards brought another action for the ſame cauſe, that he ſhould have but common bail in the ſaid action. *Lord Raym.* 679. See *Com. Rep.* 94. *ca.* 62. But this has not been abided by. 2 *Mod.* 501.

Plaintiff had been *non-pros'd* in a former action for want of a declaration, and now, in a ſecond action, moved, that defendant might be diſcharged upon common bail, alledging it to be the practice of *C. P.* *But by the court*, We know of no ſuch practice here, and think it very unreaſonable; for the plaintiff ſuffers enough by paying coſts in the firſt action, and therefore ought not to be in a worſe condition than before. *Stra.* 439. Plaintiff nonſuited in debt, on bond, may arreſt defendant in a new action on ſame bond. *Barnes* 69.

On recognizance of bail.

Upon a writ of error brought in the *Exchequer* chamber, on a judgment given in the *King's Bench*, the now defendant entered into a recognizance, purſuant to ſtatute 3 *Jam. chap.* 8. (made perpetual by 3 *Char. chap.* 4. *ſect.* 4.) that the plaintiff in error ſhould proſecute his writ, and if the judgment ſhould be affirmed, then to pay the debt, damages, and coſts.

Afterwards the judgment was affirmed, and then plaintiff brought an action of debt upon this recognizance againſt the bail; and the queſtion was, Whether they ſhould be diſcharged upon common bail? And it was ſaid by their counſel, that they ought to be diſcharged, for 'tis againſt the practice of the court, that bail ſhould be required of bail.

The reaſon laid down in the books of practice, why bail is not required of bail, is, becauſe then would be no end of bail. See *Rep. & Caſ. of Pract.* 18. *Pract. Reg. C. P.* 11.

It was never yet determined, that ſpecial bail is not requirable in an action of debt on a recognizance of bail; but the reaſon of the caſe ſeems to require it, becauſe the recognizance is directly for payment of money, *viz.* to pay the debt, if the judgment ſhould be affirmed; and certainly it was never yet denied, that where an action of debt is brought on a bond for payment of money, but that ſpecial bail is always required; and the reaſon is the ſame for ſpecial bail in an action of debt upon a recognizance againſt the bail, for ſuch recognizance is a ſecurity for the payment of the condemnation money,

a collateral undertaking that it ſhall be paid upon the affirmance of the judgment; and the bail upon the recognizance cannot be diſcharged but upon payment of the money, for they cannot render the principal, becauſe ſuch render doth not lie by the bail upon a writ: and ſo it was held by two judges, the court not being full. 8 *Mod.* 237.

If an *habeas corpus* be returned into any of the courts above, though the ſum be under 10*l.* they will hold the defendant to bail, 2 *Show. Rep.* 182. *pl.* 183. that ſo plaintiff may not be in a worſe condition than he was below, where defendant was held to bail. The reaſon why the defendants in all caſes are obliged to put in bail is, that their juriſdictions being confined, they cannot follow the debtor out of their juriſdiction; therefore they have always (in the leaſt pledges) put in bail that live within their own precincts: and, were it otherwiſe, it would be improper to give caution, and therefore it becomes here neceſſary that bail ſhould be given in all caſes. *Gilb. Hiſt. C. P.* 37. *Rule of Mich. term* 1654. *Sect.* 12 *of Mich. term* 1649. 1 *Char.* 2. 6 *Mod.* 242. *Caſes in the Time of Holt Chief Juſtice* 87. 12 *Mod.* 646. On removal.

But in caſe of an executor, or adminiſtrator, or heir, no bail is required, even on an *Habeas Corpus*, for they ought not to have been held to bail below, the debt not being their own. 6 *Mod.* 242.

An action was brought in the court of the ſheriffs of *London:* defendant brought an *Habeas Corpus cum Cauſâ*, and removed the cauſe into the *Common Pleas*; but not having put in bail, plaintiff ſued out a *Procedendo*. Motion to ſet aſide the *Procedendo*, becauſe there was no judge's order for defendant to put in bail. The queſtion was, Whether defendant ſhould not, at his own peril, put in bail? Or, whether plaintiff ſhould not procure a judge's order, and ſerve it upon defendant, that unleſs bail be put in, *Procedendo* ſhould be awarded? Adjudged *by the whole court*, that ſuch an order was neceſſary, and therefore the *Procedendo* was ſet aſide. *Pract. Reg. C. P.* 52.

An action was brought againſt defendant for a ſhip and cargo, and the queſtion was, Whether defendant ſhould be diſcharged upon common bail? The cauſe came in from *London* by *Habeas Corpus*, and therefore it was inſiſted, that ſpecial bail ſhould be put in of courſe. But *Holt* Chief Juſtice held, they might examine into the cauſe of action, how it came thither by *Habeas Corpus*, and if it was ſuch which required bail, though under 10*l.* they might make defendant put in ſpecial bail; but if the action was vexatious, or ſuch as required no bail, then they would diſcharge him upon bail. See 2 *Show. Rep.* 182. *pl.* 183. It was urged for the defendant, that what he did in relation to the ſhip and cargo, was as Judge of the *Admiralty* in the *Weſt-Indies*, and therefore no reaſon why he ſhould be held to bail: but it appearing that defendant had the ſhip and cargo in his own cuſtody, which was intermeddling further than his office warranted; for this reaſon he was held to bail. *Salk.* 101. *Caſes in the Time of Holt Chief Juſtice* 88, 89.

In error and outlawry.

That before any allowance of any writ of error, or reverſing of any outlawry be had, by plea or otherwiſe, through or for want of any proclamation to be had or made, according to the form of ſtat. 31 *El. chap.* 3. *ſect.* 3. the defendant and defendants in the original action ſhall put in bail, not only to appear and anſwer to the plaintiff in the former ſuit, in a new action to be commenced by the ſaid plaintiff, for the cauſe mentioned in the firſt action, but alſo the condemnation, if the plaintiff ſhall begin his ſuit before the end of two terms next after the writ of error, or otherwiſe avoiding of the ſaid outlawry. *Rule of Mich. term* 12 *Geo.* 1725. *C. P.* See *Hil.* 15 & 16 *Char.* 2. 1663. *Trin.* 2 *Jam.* 2. 1686. See 10 *Mod.* 281.

Plaintiff declared in an action of debt upon bond; defendant craved *oyer*, and the condition appeared to be for performance of covenants. Defendant, after *oyer*, inſtead of pleading, enters *nil dicit*, in order that *oyer* of the condition appearing upon record, he might bring a writ of error without bail. The court,

court, upon hearing counſel on both ſides, ſet aſide this entry, and gave plaintiff leave to enter judgment by default. And the queſtion now was, Whether the condition of the bond, not appearing on record, bail ought to be required on the writ of error or not? And the court held, that the matter of bail is properly examinable by affidavit; and the bond being conditioned for performance of covenants, bail ought not to be required on the writ of error. *Barnes* 67.

Judgment in *C. B.* in debt on a bond, with condition to pay 500*l.* with intereſt at 5*l. an hundred*, being the ſame ſum as is mentioned in a defeazance, bearing date the ſame day with the bond. Error brought, bail muſt be put in on this writ of error, purſuant to ſtat. 3 *Jam. chap.* 8. (revived and made perpetual by 3 *Char. c.* 4. *ſect.* 4.) 2 *Stra.* 959. Caſes in the time of Lord *Raym. & Hardw.* Chief Juſtices, 181. *pl.* 147. 2 *Barnard. K. B.* 389. See *Show. Rep.* 14. *Comb.* 105.

Debt on a bond, conditioned that defendant ſhould pay to plaintiff for all ſuch beer as he ſhould deliver to one *Stokes*, not exceeding 100*l.* Plea, No beer delivered. Replication, Beer delivered to the value of 80*l.* Demurrer, Judgment for plaintiff. Error brought. *By the court*, Bail is not neceſſary on this writ of error; the words of the ſtatute muſt be intended of a ſum certain, even at the time the action was brought. It was inſiſted, that the ſum was aſcertained by the pleadings; *but not allowed. Deniſon* Juſtice ſeemed to doubt of the caſe. *Suppl. to Lil. Abr.* 19. *pl.* 6. See *Lev.* 117. *Keb.* 613, 690. *Yelv.* 227.

Writ of error on a judgment in ejectment. The recognizance of plaintiff in error was of two years value of the land, but the court would not make him juſtify. Stat. 16 & 17 *Char.* 2. *c.* 8. (revived and made perpetual by 22 & 23 *Char.* 2. *c.* 4.) *Barnard. K. B.* 83.

Bond was for ſafe return of ſuch a ſhip, (ſuppoſe under 100*l.* penalty) and judgment thereupon in the *Common Pleas*, and writ of error here; and the

queſtion was, Whether there ſhould be bail within the ſtatute? And, *by the court*, Let there be bail, *unleſs cauſe*. 6 *Mod.* 38.

When a writ of error is brought on a judgment had upon a bond to pay money (only), there ſpecial bail ought to be given; and after a year, a *Scire Facias* ought to precede the *Levari*, or *Fieri Facias*. By the ſtat. 3 *Jam. chap.* 8. 11 *Mod.* 2.

Motion that plaintiff in error might put in ſpecial bail. This was an action upon the caſe on a bottomree bond, to pay money on a contingency, the condition of which was, that if the ſhip or veſſel called *Oley Frigat*, &c. ſhall with all ſpeed ſail from the river of *Thames* to *China*, &c. without deviation, and return to the river within thirty-ſix kalendar months, hazard of the ſea excepted; and if *J. S.* ſhall, within the ſaid thirty-ſix kalendar months, or thirty days after the arrival of the ſaid ſhip, pay, &c. then the obligation to be void.

Holt ſaid, This is not a bond only for the payment of money, for if he does not go the voyage, he forfeits the penalty; for his going the voyage, return, and payment of the money, are all conditions: and inclined, that it did not require ſpecial bail. 11 *Mod.* 260.

Judgment in ejectment on a ſpecial verdict for the defendant. Error brought by plaintiff. Agreed *by the whole court*, No bail requirable on this writ of error. *Pract. Reg. C. P.* 178, 179.

Error brought by an heir at law, on a general judgment by *Nil dicit*. Agreed he ſhall give bail. *Barnes* 71.

Ejectment, verdict for plaintiff, writ of error brought, and bail put in. Motion that bail might juſtify. Defendant in error objected, that by the ſtatute 16 & 17 *Char.* 2. *c.* 8. *ſect.* 3. (revived and made perpetual by 22 & 23 *Char.* 2. *c.* 4.) it was required that plaintiff in error ſhould himſelf enter into the recognizance in caſes of ejectment and dower. *Eyre* urged, that two perſons becoming bail, gave judgment in error a better ſecurity than he could have had, in caſe plaintiff in error had alone entered

into

into the recognizance. Clerk of the errors ſaid the practice was both ways. *By the court:* Let the bail juſtify, and if plaintiff in the ejectment thinks the writ of error is not a *Superſedeas* becauſe plaintiff in error has not entered into the recognizance, let him proceed at his peril. *Barnes* 71.

Error in the *Exchequer* chamber upon a judgment given in *K. B.* and there the judgment was affirmed. Afterwards a writ of error was brought in the houſe of peers, and plaintiff in the original action being about to take out execution againſt defendant, for entering bail according to the ſtatute 3 *Jam. c.* 8. (ſee 16 & 17 *Char.* 2. *c.* 8.) by which it is enacted, That no execution ſhall be ſtayed on any writ of error, or *Superſedeas*, for reverſing a judgment in any action of debt or contract, unleſs plaintiff in error ſhall firſt be bound with two ſufficient ſecurities, (ſuch as the court ſhall approve) to the party for whom the judgment was given by recognizance in the ſame court, in double the ſame. Adjudged to proſecute his writ of error with effect, and that if the judgment is affirmed, then to pay all debts, damages, and coſts ſo adjudged, and all coſts and damages for delaying the execution by the writ of error, *&c.*

Now defendant having already entered into ſuch recognizance in *K. B.* before the writ of error was allowed, it was inſiſted for him, that he is not obliged by this ſtatute to give a new recognizance of bail, having already purſued the ſtatute, by giving bail in that court where the judgment was given, and it would be very hard for him to be bound in two recognizances for one and the ſame matter.

On the other ſide it was inſiſted, that this matter is ſo plain, that it was never controverted; for, upon a writ of error in parliament, plaintiff in error muſt alledge the judgment in *K. B.* to be erroneous, as the judgment in the *Exchequer* chamber; and this writ is brought in delay of execution of the judgment: but the firſt recognizance doth not extend to the coſts ſuſtained in the houſe of peers, but only to the coſts for delaying the execution by the firſt writ

of error; ſo that if a new recognizance ſhould not be given, the coſts upon the writ of error in parliament, if the judgment ſhould be affirmed, would be loſt.

'Tis true, the ſtatute enacts, that bail ſhall be given in the ſame court where the judgment was given; but this is only explanatory, and intended that it ſhould be given where the judgment was of record.

The intent of this ſtatute is, that the party ſhall not loſe his damages and coſts for delaying execution of a judgment by a writ of error; now the judgment given in the *Exchequer* chamber in affirmance of the judgment in *K. B.* remands the record back again into that court; and if ſo, then there is no record of he judgment given in the *Exchequer* chamber, and therefore the writ of error in the parliament is directed to the Chief Juſtice of *K. B.* where the record remains, and the judgment muſt be deemed as a judgment of that court, as to the writ of error, and all incidents thereof, ſuch as putting in bail, *&c.*

And there is no manner of inconveniency by entering into two recognizances, for both are the ſame, in reſpect to the plaintiff in error, becauſe by the ſtatute he hath a proper remedy, if the plaintiff in the original action take out execution for more than is due; but it would be very inconvenient for him to be delayed by a writ of error, and to have no ſufficient ſecurity to make ſatisfaction for his loſs.

There is a caſe in *Hob.* 247. where an executor was obliged to give bail in the Chamberlain of *London*'s court, and likewiſe bail for the ſame thing in the ſpiritual court, and ſo double bail; and this was warranted only by a particular cuſtom in *London*, which is not to be favoured ſo much as a general ſtatute for the advancement of juſtice: ſo the party was ruled to put in new bail in *K. B.* 8 *Mod.* 79. *Salk.* 97.

Warrants.

Warrant to three.

A warrant made to three, *conjunctim & diviſim*, this being a warrant for execution of juſtice, may be ſufficiently executed by two. 2 *Rol. Rep.* 137.

So a ſheriff makes a warrant to four, & *cuilibet* To four.
orum, quod ipſi caperent: two of the four take him, it's good. *Yelv.* 25.

For warrants of this kind are not to be reſembled Diverſity.
to warrants of authority to make or take livery.

A warrant to two men jointly to arreſt another, To two jointly.
either of them may do it. *Co. Lit.* 181. *Cro. El.* 913.

"Every proceſs for arreſting, and every writ of Attorney's name
execution, or ſome label annexed, and every warrant to be indorſed on
upon ſuch proceſs, ſhall, before ſervice or execution, proceſs.
be ſubſcribed or indorſed with the name of the attorney, clerk in court, or ſolicitor, by whom ſuch proceſs, &c. ſhall be ſued forth; and where ſuch attorney, &c. ſhall not be the perſon immediately employed, then alſo with the name of the attorney ſo immediately employed: and every copy of any writ ſerved upon any defendant, ſhall before ſervice be ſubſcribed with the name of the attorney immediately employed." Stat. 2 *Geo.* 2. *c.* 23. *ſ.* 22. perpetuated by 30 *Geo.* 2. *c.* 19. *ſect.* 75.

Rule to ſhew cauſe why proceedings ſhould not be ſtaid, diſcharged with coſts. Objection was, that no attorney's name was ſet to ſheriff's warrant, as required by act of parliament; but, by court, warrant is not void, act of parliament is directory only: ſheriff is blameable, but party muſt not ſuffer for his default. *Barnes* 303. *Pract. Reg. C. P.* 441. 2 *Barnes* 327. *Pract. Reg. C. P.* 442.

"The not ſubſcribing or indorſing the name of Not indorſing
the attorney, clerk in court, or ſolicitor, on any attorney's name
warrant made upon any writ, proceſs, or execution, on warrants, not
ſhall not vitiate the ſame; but ſuch writ, proceſs, to vitiate.
and execution, and all proceedings thereon, ſhall be valid and effectual, provided the writ whereon ſuch warrant is made out, be regularly ſubſcribed or indorſed; and every ſheriff or other officer, who ſhall Penalty of not
make out any warrant upon any writ, proceſs, or indorſing it on
execution, and ſhall not ſubſcribe or indorſe the writs.
name of the attorney, clerk in court, or ſolicitor, who ſued out the ſame, ſhall forfeit the ſum of 5 *l.*

to

to be aſſeſſed as a fine by the court out of which ſuch writ, proceſs, or execution ſhall iſſue; one moiety to be paid to his Majeſty, and the other moiety to the perſon aggrieved." Stat. 12 *Geo.* 2. *c.* 13. *ſect.* 4.

Sheriff not to grant a warrant before he receives the writ.

"No high ſheriff, under ſheriff, their deputies or agents, ſhall make out any warrant, before they have in their cuſtody the writs upon which ſuch warrants ought to iſſue, on forfeiture of 10*l.*" Stat. 6 *Geo. c.* 21. *ſect.* 53. 43 *El. c.* 6. *ſect.* 1. See *Dalt. Sher.* 111, 112.

Sheriff ought not to give out blank warrants.

Per Holt: The ſheriff ought not to make a blank warrant, for the attorney to fill with a ſpecial bailiff. 12 *Mod.* 527.

Warrant to the bailiff, evidence againſt the ſheriff, *&c.*

The warrant under the hand of the ſheriff to the bailiff is good evidence, *&c.* It is not ſhewn, that the plaintiff was proſecuted or arreſted at the ſuit of the defendant; and perhaps the defendant was only the bailiff, and then the action will not lie againſt him. *Lord Raym.* 504.

Date of the writ to be within the warrant.

"Every warrant to be made out upon any writ out of the *King's Bench*, *Common Pleas*, or *Exchequer*, before judgment, to arreſt any perſon, ſhall have the ſame day and year ſet down thereon as ſhall be ſet down on the writ itſelf, under forfeiture of 10*l.* to be paid by the perſon who ſhall fill up or deliver out ſuch warrant; both penalties to be recovered and divided, as the other penalties in 9 *W. 3. c.* 25. *ibid. ſect.* 54.

On rule to ſhew cauſe, why an information ſhould not go againſt a man, chief complaint that remained unanſwered, was, that he executed a *blank* warrant; and it was ſaid, this was ruled to be bad very lately at the aſſizes at *Carliſle*. But Judge *Page* ſaid, that upon an indictment of murder, a juſtification was made by a *blank* warrant before Mr. Juſtice *Powell*, and he allowed it to be good. He believed too, that in theſe large counties, as this was in *Yorkſhire*, the practice of making out *blank* warrants is very frequent: however, court in general ſaid, that there was no occaſion to determine legality of this matter now. Preſent motion was for an information, and

they

did not think this a ſufficient reaſon for grant-
it. There is another remedy for party, if he
ks proper to try, whether theſe warrants are le-
or not? Accordingly rule was diſcharged. 2
iard. K. B. 198.

n treſpaſs for plaintiff's houſe and falſe impriſon-
t, defendant pleaded, that a *capias ad reſpon-*
dum was ſued out againſt plaintiff, and a warrant
e out to defendant, as bailiff; thereupon he came
laintiff's houſe, and found outward door open,
upon that he entered, and came to an inward
of a chamber, wherein plaintiff was, which in-
d door was ſhut; upon which he requeſted plain-
to open the door, but on his refuſing to do it he
e it open, and arreſted plaintiff by virtue of ſame
rant. In evidence to ſupport this plea, defend-
produced this warrant; but his attorney owned
it was a *blank* one, and he filled it up: but
withſtanding this the judge was of opinion, that
rant was legal; and in in caſe of an indictment
nurder, tried before Mr. Baron *Lovel*, he obſerved
Judge was of ſame opinion. Defendant then
nt on to prove the other part of his juſtification,
becauſe he failed in proving requeſt, judge di-
ed a verdict to be for plaintiff. 2 *Barnard. K. B.*
.

f ſheriff has a good writ againſt a man, and he
es an ill warrant to his bailiffs upon it to arreſt
man, and they arreſt him accordingly, though
iffs cannot, yet the ſheriff may juſtify by virtue
the writ; for if ſheriff be in any manner privy to
ing, as if he commanded his bailiffs to arreſt a
n by parol, when he is taken accordingly, he is
cuſtody of ſheriff: and if he has a writ againſt
at the ſame time he is arreſted, and is in cuſtody
virtue of the writ, indeed ſheriff muſt be privy
taking, or otherwiſe he cannot be in his cuſtody.
againſt *Fowler*. *Lord Raym.* 586.

Sheriff, upon bill of *Middleſex*, makes precept to
liff of *Weſtminſter*, to arreſt *J. Ferrers* knight,
en in truth he was not knight, but baronet only.
is was not a good warrant, and deputy bailiff
being

being killed by Sir *John*'s ſervant, it was not found murder in ſervant, becauſe bailiff's warrant was not good, and upon trial the ſervant was acquitted. *Ja.* 346. *pl.* 5. *Cro. Char.* 372. *pl.* 6. *Hawk. Pl. Cr. c.* 31. *ſect.* 37. *p.* 86. See *Stra.* 156.

If ſheriff's bailiff comes to execute proceſs, but hath not a lawful warrant, as if name of bailiff, plaintiff or defendant be interlined or inſerted after ſealing thereof, by bailiff himſelf, or any other, if ſuch bailiff be killed, it is but manſlaughter, and not murder. *Hal. Hiſt. Pl. Cr.* 457.

So held in the caſe of *John Stevenſon*, who was tried for the murder of Mr. *Francis Elcock*, at *Cheſter Lent* aſſizes 1759. See *Cro. Char.* 538, 539.

If officer arreſt party before he has a warrant, and afterwards procures one, yet firſt arreſt is wrongful. *Dalt. Sher. c.* 22. *p.* 111.

Sheriff's bailiff cannot execute writ directed to ſheriff, without ſheriff's warrant.

Return in *K. B.* If the writ comes out of the *King's Bench*, then the warrant muſt be, *So that I may have his body before the Lord the King*, &c.

In *C. P.* If out of the *Common Pleas*, then it muſt be, *So that I may have his body before the juſtices of the Lord the King*, &c.

General arreſt upon three ſpecial warrants. If three writs of *Capias* in proceſs at the ſuit of *J. S.* againſt *J. D.* are directed to the ſheriff, and the ſheriff make three ſpecial warrants to one ſpecial bailiff, and he comes to *J. D.* and arreſts him generally, without ſhewing him in what action, neither is it demanded of him, but preſently upon the arreſt a ſtranger reſcues him, action on the caſe lies againſt the ſtranger for all the three, for this was an arreſt in law upon all. 17 *Vin. Abr.* 538. (F.) *pl.* 1. 541. *pl.* 4. *Cro. Jac.* 485, 486.

Reſcue. So if the writs and warrants were at the ſuit of three ſeveral perſons, and the bailiff arreſts him generally, as before, for as this is a good arreſt for all, all ſhall have actions for the reſcue.

When to be ſhewn. He is not bound to ſhew his warrant at firſt, or to ſhew at whoſe ſuit it is, before he had peaceably ſubmitted to the arreſt. *Cro. Jac.* 485, 486.

B

But in the Counteſs of *Rutland*'s caſe it is holden, Ought to declare at whoſe ſuit.
en the ſheriff or other perſon by his authority eſts another, he ought upon the arreſt to ſhew at oſe ſuit, out of what court, for what cauſe, and en the proceſs is returnable, to the intent that if The reaſon.
be upon execution, he may pay it, and free his dy, or agree with the party, or put in bail acding to law, and to know when he ſhall appear. is is meant after a peaceable ſubmiſſion, *Cro. Jac.* 5, 486, which is a leading caſe in the point. But en the party makes reſiſtance, or flieth, he need t make ſuch declaration. *Dalt.* 110.

The bailiff who had two warrants againſt one at Where the officer had warrants in his pocket,
ſuit of *J. S.* laid his hands on him, and having h the warrants in his pocket, he ſaid, I arreſt by force of a warrant I have; but did not ſhew him, nor had it in his hands, nor told him at oſe ſuit. (This was not a bailiff conus.) *Cro. c.* 485, 486.

The court reſolved, 1. This arreſt, without ſhew- Defendant ought to demand them.
the warrant, and telling at whoſe ſuit, till the er demanded, is legal.

2. This arreſt, without having the warrant in his nd, and having both warrants about him, is well ough, though he did not ſhew by which of the rrants he arreſted him; for he being under the liff's arreſt, is in cuſtody there for all cauſes, for ich the ſheriff had made his warrant againſt him, ough the ſheriff or bailiff do not mention any ſpelly.

And *Roll* C. J. in another caſe, took this differ- Special bailiff muſt ſhew.
ce; a ſpecial bailiff is bound to ſhew his warrant the party whom he is to arreſt, otherwiſe the rty arreſted is not tied to obey him; but he is not und to ſhew his warrant to a ſtranger.

But a known bailiff, *i. e.* one that is commonly A known bailiff.
own, is not bound to ſhew his warrant to any.

A ſworn and known officer (be he ſheriff, under- Sworn officer.
riff, bailiff, or ſerjeant) need not ſhew his warnt; yet, upon the arreſt, the officer ought to dere the contents of the warrants, *ut ſupra.*

If

Arreſt before warrant.

If officer arreſt a man before he has a warrant, and afterwards procures a warrant, yet the firſt arreſt was unlawful. *Dalt.* 111.

On a ſummons.

So if the officer do make a warrant for ſummoning or arreſt, not having the original writ or proceſs warranting the ſame, if it appear to the judges, they ſhall commit the offender to the gaol till he has paid 10*l.* to the party grieved, and 10*l.* to the King.

Capias.

But a *Capias*, without original, is ſufficient warrant to the ſheriff. 43 *El. c.* 6. *Dalt.* 111, 112.

Actions for diſturbing the Proceſs of Law.

For hindering one in his franchiſe, &c.

An action of the caſe will lie againſt him that ſhall hinder, diſturb, or prejudice one that hath the franchiſe or liberty of the execution and return of writs and proceſs, in an hundred or other place. *F. N. B.* 95. *Reg. Orig.* 103, 104.

So if a man be diſturbed to take the profit of his office. *Poph.* 141.

To attach or diſtrain goods.

So againſt him that ſhall diſturb an officer in the execution of his office; as in the attaching and diſtraining of goods, and lieth either for the officer or plaintiff in the ſuit. *F. N. B.* 102.

From doing execution in the houſe of a ſtranger, &c.

So if one hinder an officer in doing of execution of his office at my ſuit; as where the ſheriff ſhall come to another man's houſe, where the goods of the defendant are, and the door of the houſe being open, another man, not the owner of the houſe, doth ſhut the door and keep him out: or the owner of the houſe, or another man, ſhall convey away the goods and prevent execution, I may have an action againſt him.

But if a man do ſo in his own houſe, or to prevent the execution of his own goods, no action will lie. 5 *Co.* 91.

So of the goods of *J. S.* in the houſe of *K. L.*

So if I have an execution againſt the goods of *J. S.* and he hath goods in the houſe of *K. L.* and the ſheriff comes to the houſe, and tells *K. L.* who he is, and wherefore he comes, and deſires him to open the doors to him, and he keeps him out by

e cannot do execution, I may have this action ainſt *K. L.* 5 *Co.* 93.

So if an officer be coming to arreſt a man, or at- ch his goods at my ſuit, and another man convey way the goods or the perſon, ſo that the officer nnot do this work, I may have this action. *F. B.* 102. 21 *H.* 7. 40. 18 *Ed.* 3. 3.

For conveying away the goods to be attached,

But it was agreed, that upon a *Ca' S'* the ſheriff ay not break open a man's houſe to make execu- on, but he is puniſhable for it; but upon a *Capias tlagatum* he may enter any man's houſe to appre- nd him, for no place ought to protect him againſt s King: but whether he might, upon a *Fieri facias*, *Extendi facias*, break the houſe of any to make ecution, was doubted; but no doubt, if the doors ere open, he might enter, for the law gives him thority thereto; as an executor may enter to take ods left there by the teſtator. *Cro. Eliz.* 908.

Where the ſheriff may not break open a man's houſe.

Which action was brought againſt the defendant r ſhutting his door, and hindering the ſheriff to ſeize e goods of *G. B.* in his houſe. And *Fenner* and *lverton* were of opinion, that the goods being in e defendant's houſe, who is a ſtranger to the ex- ution, he is not bound to take cognizance of the eriff's intent in coming to make execution, and s ſhutting the door was lawful; and although there as loſs to the plaintiff, yet it was.

For ſhutting his door and hinder- ing the ſheriff to ſeize goods, &c.

And it appeared not that the goods of the cogni- ors, which were in the defendant's houſe, came ither; and if they were taken by the defendant as treſpaſſor, the party whoſe goods they are, or the eriff upon execution, may come within the houſe, the door be open, to ſeize them, becauſe the de- ndant had them by unlawful means.

But if the defendant had taken them by lawful eans, *viz.* by bailment or otherwiſe, neither the rty himſelf, nor the ſheriff, can come within the uſe to ſeize them; and therefore the ſhutting the or was no cauſe of action for the plaintiff.

Aliter where the defendant takes in goods by law- ful means.

To this *Williams* agreed *in omnibus*, and that the eriff might not break any man's houſe to make execution,

Where the ſheriff may not break a houſe to make execution.

execution, unleſs in the caſe of the king, or for a contempt; and thereupon judgment for the defendant.

Breaking open doors to arreſt.

One inſtance of their miniſters of juſtice miſbehaviour, which hath been the ſubject of litigation, is that of breaking open windows or doors in order to arreſt. And as this is a matter of general concern, I will be a little particular, though brief, upon it. *Foſt. Cr. Law* 319.

An officer cannot juſtify breaking open an outward door or window, in order to execute process in a civil ſuit: if he doth, he is a treſpaſſer; but if he findeth the outward door open, and entereth that way, or if the door be opened to him from within, and he entereth, he may break open inward doors if he findeth *that* neceſſary in order to execute his proceſs. *Id.*

The books ſay, that a man's houſe is his caſtle for ſafety and repoſe to himſelf and family; and conſequently the officer in the caſe I have put, being a treſpaſſer, cannot be ſaid to be acting in the diſcharge of his duty, at the time and in the very inſtance in which he is committing a treſpaſs; theſe ſuppoſitions are inconſiſtent, and deſtroy each other: but if he findeth the door open, or gaineth admiſſion from within, he having a lawful call to the place, as he certainly hath, cannot be a treſpaſſer in entering the houſe, and conſequently may remove any obſtruction he meeteth with in proſecuting the buſineſs he came about.

The rule that every man's houſe is his caſtle, when applied to the caſe of arreſts upon legal proceſs, hath been carried as far as the true principles of political juſtice will warrant; perhaps beyond what, in the ſcale of ſound reaſon and good policy, they will warrant: but in caſes of life we muſt adhere to rules well known, and long eſtabliſhed.

But this rule is not one of thoſe that will admit of any extenſion, it muſt therefore, as I have before hinted, be confined to the breach of windows, and outward doors, intended for the ſecurity of the

houſe, againſt perſons from without endeavouring to break in. *Id.*

It muſt likewiſe be confined to a breach of the houſe in order to arreſt the occupier, or any of his family, who have their domicile, their ordinary residence there. For if a ſtranger whoſe ordinary residence is elſewhere, upon a purſuit taketh refuge in the houſe of another, this is not *his* caſtle, he cannot claim the benefit of ſanctuary in it.

The rule is likewiſe confined to the caſe of arreſts *the firſt inſtance.* For if a man being legally arreſted (and laying hold of the priſoner, and pronouncing the words of arreſt, is an actual arreſt, *Salk.* 79. *Ventr.* 306. 6 *Mod.* 173. 7 *Mod.* 8. 2 Ld. *Raym.* 1028.) eſcapeth from the officer, and taketh helter, though *in his own houſe*, the officer may, upon freſh ſuit break open doors, in order to retake him, having firſt given due notice of his buſineſs, and demanded admiſſion, and been refuſed.

And let it be remembered, that not only in this, but in every caſe when doors may be broken open in order to arreſt, whether in caſes criminal, or civil, there muſt be ſuch notification, demand, and refuſal, before the parties concerned proceed to that extremity.

The rule already mentioned, muſt likewiſe be confined to the caſe of arreſts upon proceſs in civil ſuits. *Foſt. Cr. Law.* 319, *&c.*

CHAP. V.

County-Court.

THIS court is no court of record, but only a court-baron, and the ſuitors are judges. But in a *diſſeiſin* the ſheriff is judge, by the ſtatute of Merton, *c.* 3. and a writ of *error* lieth of his judgment. It is as a court baron. *Aliter* upon exigents and outlawries.

ment. But as to the proclamation upon exigents, and proceſs to the outlawry, it is a court of record.

It is incident to the office of ſheriff. *Co. Lit.* 168.

The county-court is incident to the office of ſheriff, and ſo is the entry of all proceedings there; and therefore if the king grant the office of clerkſhip of the county-court to *M.* and conſtitute *J. S.* ſheriff of the ſame county, it is a void patent, though it be granted when the ſheriffwick is vacant, yet the new ſheriff ſhall have it, and in all writs directed to the ſheriff concerning the county-court, the king ſaith *in your county*, and in return of exigents made by him, he ſaith, *at my county held*, &c. In falſe judgments it is ſaid, *in your full county you cauſe the plaint to be entred*, &c. *under your ſeal*, &c. Alſo in a precept of *tolt*, to remove a plea out of the court-baron into the county-court, it is *that you ſummon*, &c. that he be *at your county*. And it is the ſheriff's court, though the ſuitors are judges.

The ſtile of the court is, *Bucks.* The first court of the county of Sir *E. L.* knight, ſheriff of the county aforeſaid, held at *B.* &c.

And the next court, *the ſecond*, and ſo forth.

By preſcription the ſheriff may be judge.

Though it be ſaid commonly, that the ſuitors are judges, yet by preſcription the ſheriff may be judge. There is a court called the court of the county of the county palatine of *Durham*, and the ſheriff is judge: and though in the county-court the ſuitors are judges, yet by preſcription it may be held before the ſheriff. 2 & 3 *Ed.* 6. *c.* 25. *Mod. Rep.* 72.

Indictment there.

As a court-baron by ſpecial preſcription may be held *before the ſteward.*

Indictment was brought of *perjury* in a plea depending in the county-court, in an *Action on the* for 3 *l.* errors aſſigned were; firſt, it is ſaid how the plea was depending, as by *juſticies* or *plaint* entered, and, ſecondly, it is ſaid, in the county-court held before the ſheriff and *ſuitors*, and ſaith not *by cuſtom which the court has allowed.*

Juriſdiction of the county-court holdeth no ſuits of charters of lands.

This court holdeth no ſuits of charters for lands or for inheritance, or to make ſeveral plaints upon one entire debt, nor any action to compel one to

render an account, though it be under 40 *s.* becauſe the ſheriff cannot aſſign auditors, who are judges of the record; and the county-court is no court of record. 2 *Inſt.* 380.

In treſpaſs, the defendant juſtified by virtue of a precept after verdict in the county-court to levy 3 *l.* 2 *s.* 2 *d.* but for that the now plaintiff had in that court pleaded *freehold* in juſtification of taking damage-feaſant, it was ſaid, that by that trial a charge upon the freehold is in queſtion; and after freehold pleaded, they had no power to proceed in the cauſe, neither directly nor collaterally; and therefore the proceedings after ſuch plea were *before no juriſdiction*, and void; and upon this exception, judgment was given for the plaintiff. After there pleaded. hath no power to proceed.

Alſo they cannot hold plea of any debt due by record. Debt.

Yet if the debt be 40 *s.* or above, and the plaintiff will acknowledge in his declaration the receipt of ſo much as to bring it within 40 *s.* in this caſe the plaint is good: but he cannot ſplit a debt into ſeveral actions, and if he do, the defendant may plead the ſame to the juriſdiction of the court; or may have a prohibition to ſtay that indirect ſuit, or move for attachment againſt the ſteward. *Id. ib.*

In action of *treſpaſs* there holden, no force ſhall be ſuppoſed. Treſpaſs.

It holdeth no plea of debt or damages to the value of 40 *s.* or above; but by *juſticies*. *Juſticies.*

Nor of any treſpaſs *with force and arms*, becauſe a fine is due therein to the king, and no court can aſſeſs a fine, but a court of record. 2 *Inſt.* 311.

It is holden once every month upon a day certain, the month being computed according to 28 days; and the reaſon is, becauſe of the writs of *exigents*, which muſt be proclaimed there. 9 *H.* 3. *c.* 3. 2 *Ed.* 6. *c.* 25. Time of keeping it.

" It ſhall be lawful for the ſheriff of *Middleſex*, by his county-clerk, to hold his county-court, for the proceeding in purſuance of this act, on *Thurſday* in every week, at ſome place within the hundred of *Oſſulſton* in the county of *Middleſex*, and on the firſt

Tueſday in every month at ſome place within the hundreds of *Iſleworth* or *Elthorne*, and on the laſt *Tueſday* in every month at ſome place within the hundred of *Edmonton*, provided the monthly court of the ſaid ſheriff be held as has been accuſtomed." Stat. 23 *Geo.* 2. *c.* 33. *ſect.* 2.

The cauſe.

The county-court is kept once a month at a day certain, becauſe the king's writs of *exigents* are to be proclaimed there, and the *exigent* is to be directed to the ſheriff in this court, and he upon the *exigent* doth proclaim, or call the parties (ſued in courts above) to render their bodies, *&c.* or elſe to be out of the king's protection. And the coroners are to ſit with the ſheriff at every county-court, there to give judgment upon outlawries. And as to theſe matters, the county-court is a court of record. But in *London* the judgment upon *Utlawries* is given by the recorder. *Co. Lit.* 288.

How it is a court of record.

Place.

This court may be kept at any place within the county at the ſheriff's pleaſure, but not out of it.

Northumberland.

The ſheriff of *Northumberland* is to hold his county-court in the town or caſtle of *Alnwick*, and in no other place. By Stat. 2 *Ed.* 6. *c.* 25.

Suſſex.

The ſheriff of *Suſſex* is to hold his county-court one time at *Chicheſter*, and another time at *Lewes*; and ſo by turns.

Under-ſheriff to deliver liſts.

" The under-ſheriff of *Middleſex* ſhall, ſix days before the end of every month, deliver to the county-clerk of the ſaid county three liſts, each containing the names and places of abode of twelve perſons, taken from the freeholders book of the county of *Middleſex*, as ſuitors to attend the ſaid county-court for the ſucceeding month for the ſeveral diviſions hereafter named, *viz.* one liſt for the hundred of *Oſſulſton*, one for the hundred of *Iſleworth* and *Elthorne*, and one for the hundred of *Edmonton*; and the county-clerk ſhall cauſe the perſons in the ſaid liſts named, to be ſummoned to attend the ſaid court at the time and place mentioned in the ſummons; for each of which liſts the county-clerk ſhall pay the ſaid under-ſheriff 4 *d.* and no other ſuitor, except the perſons ſo ſummoned, ſhall have any voice in

n the county-court held under this act; and no per-
on ſhall be liable to be put upon ſuch liſt, oftner
han once in every year." 23 *Geo.* 2. *c.* 33.
ect. 7.

The original proceſs of this court, is *ſummons*, *attachment* and *diſtreſs infinite*. A *diſtringas* or *coun-* *warrant*, is a precept iſſuing out for a debt un-
er 40 *s.* Proceſs, ſummons, &c.

And the goods or chattels whereby the defendant ſo attached or diſtrained, the bailiff ſhall keep hem till the next county-court, except the defen-ant replevy the ſame by two pledges diſtrainable ithin the county: which pledges ſhall become ſure-es, that the defendant ſhall appear at the next ounty-court, to anſwer the plaintiff in his plaint: ut if he do not replevy the goods, and that the efendant makes default at the next court (at the ay given him by the attachment) the court ſhall ward the goods ſo attached to be forfeited, and ſhall eep the goods ſo forfeited. Goods attached, and not replevied. Forfeited.

So in diſtreſs, which muſt be plevied by four ainpernors. Diſtreſs.

If the diſtreſs be mainprized, and the defendant akes default of appearance, the court ſhall amerce e demandant and his mainpernors. And in both ſes the defendant ſhall diſtrain again to be at the ext county-court. Diſtreſs.

And ſo proceſs ſhall be made by *diſtreſs infinite*.

For every default of appearance the defendant is ſtrainable, till he come into court.

The goods attached or diſtrained in the county-ourt (whether upon a *juſticies*, or otherwiſe) ſhall e forfeited on default of appearance by the defen-nt, at the day given him by the proceſs.

It has been a queſtion, how execution ſhall be af- r recovery in county-court? not by *capias* is agreed, xcept in *Wales*. Of execution in court-baron.

The ſafeſt way (in this court, and ſo in hundred ourt or court-baron) is to have an *executione judicii* rected to the ſheriff, &c. and then the ſheriff may ake execution, as in a court of record, by *fieri* *c'*, or *levari*.

Duces tecum for non-appearance.

If the defendant doth not appear the next court after the *diſtringas* executed, then there iſſues out a *duces tecum* to cauſe him to appear; and then an *alias*, and a *pluries duces tecum*, and ſo *ad infinitum*.

Summons.

The ſheriff may before any county-court award a ſummons to his bailiff, returnable within two or three days, at his diſcretion, to ſummon the defendant by his goods, to anſwer, *&c.* and if the bailiff return *nihil*, and the plaintiff removes the ſame by

Pone.

pone into the *Common Pleas*, the court ſhall not grant a *capias*. 4 *Inſt.* 266.

The ſheriff, before the next day after his election, muſt depute and conſtitute a county-clerk to keep the court; and the ſtatute 1 *Hen.* 5. *c.* 4. prohibits

County-clerk.

ſuch a county-clerk to practice as an attorney in the ſame year. And this county-clerk ought to return no plaints (except in caſe of replevins) out of courts, but in full county *ſedente curia*; yet it is now done otherwiſe.

Adjournment of the court to a day certain.

And at the adjourning of every court he muſt appoint a day certain for the next court, to the intent the country may know at what time to reſort thither, to hear the king's writs of *exigents* and proclamations read.

Replevins.

A replevin may be either by writ, or by plaint.

Replevin by writ.

Replevin is a writ, and lieth where any man diſtrains another for rent, *&c.* then he who is diſtrained, ſhall have this writ to the ſheriff (called *replegiari facias*) to deliver to him the diſtreſs, and

Pledges.

ſhall find ſureties to purſue his action; or if he purſue it not, or it be found and adjudged againſt him, then he that took the diſtreſs ſhall have again the diſtreſs; and this is called the return of the beaſts; and in ſuch a caſe lies the writ *de retorn' habend'*. This is when goods are replevied by writ, and is at the Common law.

1. By writ.

This writ is *viſcountiel*, and in nature of a *juſticies*, in which the viſcount ſhall hold plea to any value, and is not returnable; but it may be removed

Pone.

into the *King's Bench* or *Common Pleas* by *pone*: by the plaintiff without cauſe, and by the defendant with

with cauſe ſhewn in the writ. 3 *Inſt.* 339, 340. *Stat. Weſt.* 2. *c.* 2.

If a replevin be ſued by writ, and the ſheriff return, that the cattle are not to be found, then a *Withernam* ſhall be awarded againſt the defendant; and if a *Nihil* be returned, then an *Alias* & *Pluries Withernam*, and thereupon an *Exigent*. *Withernam.*

If the defendant, upon the *Retorn' Habend'* adjudged for him, cannot have return of the beaſts; and upon the *Retorn' Habend'* the ſheriff return, that the cattle, firſt taken, are dead, he may have a *Scire Facias* againſt the pledges; and upon *Nihil* returned on that, he may have a *Scire Facias* againſt the ſheriff, for inſufficient pledges are no pledges. *Brownl. Rep.* 168. *Co. Lit.* 145. *Scire Facias.*

Replevin by plaint, is by force of the ſtatute of *Marlbridge c.* 21. 52 *Hen.* 3. 2. By plaint.

The ſheriff by plaint made without writ may, either by parol or by precept, command his bailiff to deliver the goods or cattle, *i. e.* to make replevin of them. 2 *Inſt.* 139, 140.

When the diſtreſs is taken and impounded *within liberties*, which have return of writs, the ſheriff muſt make a warrant to the bailiff of the liberty to make delivery; and if he will not, the ſheriff may enter and do it. If the diſtreſs be taken *out of liberties*, and impounded within, the ſheriff, upon plaint made, may preſently enter, and make deliverance. 3 *Inſt.* 139.

If they are impounded in a caſtle or houſe, the ſheriff may break it, and make replevin, and he cannot return he was reſiſted, for he may take the *poſſe comitat'*. 2 *Inſt.* 105, 194. Sheriff may break caſtle, houſe, or cloſe, to make replevin.

If the beaſts be imparked in a cloſe incloſed, which had a gate open, and the ſheriff comes to make replevin, and the owner ſtands at the gate to ſtop him, he may break the cloſe to make replevin. 2 *Rol. Abr.* 565. *b.* 20 *Hen.* 6. 30.

For neceſſity the ſheriff may enter a plaint before himſelf, and after return it in the county court, that ſo the cattle may not periſh. *Keb. Rep.* 205. Replevin made preſently.

He may take a plaint out of the county-court, and make replevin preſently, and not ſtay till the next county court, which is holden from month to month.

The manner of replevying.

Cattle being diſtrained for rent or damage feazant, &c. the owner of the cattle muſt go to the county clerk (or ſome *(a)* deputy in the county for the granting of replevins) for a replevy, to be directed to the bailiffs to replevy them; and the party muſt

Bond.

be bound in an obligation to the viſcount to proſecute his action againſt him or them that take the cattle, or to make return of the ſame cattle to the diſtrainer, if he by juſtification or avowry do recover: and if he purſue it not, or it be found againſt him, then he that took the diſtreſs ſhall have again the diſtreſs, and ſhall have

Retorn' Habend'

a writ from above, *de Retorn' Habend'* in ſuch caſe.

If the goods cannot be taken by the firſt replevin, then iſſues forth an *Alias*, then a *(b) Pluries*, then

Return.

a *Toties*, then a *Withernam*. If the ſheriff return, that he cannot replevy the cattle becauſe that they are eloined, (or he cannot have the view of them) for the ſheriff muſt make enquiry if the return be true; and if ſo, then he muſt make a precept to the bailiff in *Withernam*, *i. e.* to take as many other cattle, and he may have an *Alias* and a *Pluries Withernam*, and ſo *in Infinitum*, but hath no other remedy in the county, unleſs againſt the pledges, and for default thereof, againſt the bailiff; and if he be not able, then againſt the ſheriff. See *Weſt.* 2. *c.* 2. *Co. Lit.* 145.

Withernam.

This ſort of replevin may be returned out of the

Re. fa. lo.

county into the court of *Common Pleas* by *Recordare fac' Loquelam.* Weſt. 2. c. 2.

The ſheriff upon a *Retorn' Habend'* may enquire the kinds of the cattle, if the count or avowry be uncertain. *Leon.* 193. *pl.* 277.

What is a good return in a replevin or not.

In a replevin, no ſuch beaſt is not a good return; but *beaſts eloined, or no body came on behalf of the plaintiff, to ſhew the beaſts.*

(a) 1 & 2 *Phil. & Mar. chap.* 12.

(b) The *Pluries* replevin ſuperſedes the proceedings of the ſheriff; otherwiſe of a *Recordare.* *R. Raym.* 617. 19 *Vin. Abr.* 4.

Sheriff

Sheriff on replevin of goods ſaith, that none came ſhew him the goods, it is a good return, for he annot know the goods without ſhewing of the par- *Keb. Rep.* 184. *pl.* 160.

If *J. S.* ſue a replevin to the ſheriff, and ſhews im the cattle of *J. N.* and ſaith, they are his cat- e, and he makes replevin of the cattle, he is a treſ- aſſer to *J. N.* and the ſheriff may have an action of reſpaſs againſt *J. S.* for his falſe information; for he ſheriff at his peril muſt take notice whoſe cattle ey be: but if there be any fraud in the matter, he ay aver that. 3 *Hen.* 7. 14 *Hen.* 4. *Brownl.* 11. 13 *Vin. Abr.* 541. *pl.* 5. Sheriff makes replevin of a ſtranger, he is a treſpaſſer.

If a man have judgment to have a return upon a onſuit in a replevin, and the plaintiff brings a ſe- ond deliverance, this is a *Superſedeas* of the return; et the defendant in the replevin ſhall have a writ enquire of damages: but if he have judgment in e ſecond deliverance, then it ſhall be returned *ir- pleviſable*, and he ſhall recover damages. *Gouldſb.* 35. *pl.* 126. Writ of ſecond deliverance.

If the return *fugitive* in another county, or that e bailiff of the liberty returns *Elongata*, or that he n't have the view; in all theſe caſes a *Withernam* all be awarded. *Co. Rep.* 145. *b.* *Withernam.*

The writ of *Withernam* ought to rehearſe the re- rn of the ſheriff.

At *Common law* a man might have been nonſuited replevin, and have had new ones *in Infinitum.* ut *Weſt.* 2. *c.* 2. reſtrains the plaintiff for having y more replevin after nonſuit, but gives the writ *ſecond deliverance*. *Coke* 2 *Inſt.* 240. This writ a *Superſedeas* in law to the ſheriff, that he make return to the defendant on the former nonſuit. *Inſt.* 341. But 'tis no *Superſedeas* on a writ of quiry. *Salk.* 95. *pl.* 6. 12 *Mod.* 546. *Palm.* 3. *Danv. Abr.* 41. *b. pl.* 6. *Keilw.* 92. *b. pl.* 18 *Vin. Abr.* 596. *pl.* 20. Noté; 'tis ſaid this it of ſecond Deliverance is taken away by a ſta- te *temp. Char.* 2. *Quære Compl. Sher.* 74. No more replevin after nonſuit, but ſecond deliverance.

In a replevin, if the proceſs continue until a *Plu-* es iſſues out of *Chancery*, and the ſheriff return upon Return upon proceſs that the defendant claims property.

on this in *B.* that the defendant claims property, although no day is expreſly given by this writ to the parties, but to the ſheriff only, to excuſe his contempt for not ſerving the proceſs before; yet upon the return of this writ the parties may appear and plead, *viz.* the plaintiff may declare, and the defendant may plead to it, and it ſhall not be erroneous, for there is no other writ to be ſerved after this writ; therefore if the parties might not plead upon this, it would be a great miſchief. So if the *Pluries* be returned in *Mich.* term, and nothing is done till *Eaſter* afterwards, yet at this term the parties may appear and plead if they will. *Rol. Abr.* 581. *Mo.* 403. *pl.* 537. 18 *Vin. Abr.* 582. *pl.* 5.

Where upon the replevin the claim of property is made.

Where the defendant, when the ſheriff comes to make replevin, claims property, the ſheriff cannot proceed; for 'tis a rule in law, the property ought to be tried by writ: therefore in that caſe, where the trial is by plaint, the plaintiff may have a writ to *prove the property*, directed to the ſheriff to try the property; and if it be found for the plaintiff, the ſheriff is to make deliverance; if for the defendant, then he can no further proceed. *Co. Lit.* 145. *b.*

And to try the property, the ſheriff ought to take with him *the Keepers of the Pleas of the Crown.* Dy. 173.

In replevin the plaintiff claims property, and thereupon a writ iſſues to the ſheriff to try the value. 2 *Keb. Rep.* 550. *pl.* 27.

Servants may not claim it.

Note, that the ſervant may not claim property for his maſter, nor a ſtranger cannot claim property; but the ſheriff ought to make deliverance, notwithſtanding the ſervant's claim, and but one defendant may claim property. *Compl. Sher.* 74.

Where one ſues a replevin, but hath not the delivery of the goods, and the other avoweth, and the plaintiff ſheweth the defendant is yet poſſeſſed of the goods, *&c.* and prays that the defendant may gage deliverance; then he ſhall put in ſureties and pledges for the deliverance, and a writ ſhall go forth for the ſheriff to deliver them.

Gage deliverance.

Where the replevin is by plaint, there it may be moved out of the county into the *Common Pleas* by *Recordare*, and the ſheriff hereupon is to ſummon the other party to be in the *Common Bench*, or *B. R.* at a day certain; and of all this he is to make certificate under his own ſeal, and the ſeals of four ſuitors of the ſame court. *Recordare.*

In replevin the ſheriff ought to take two ſorts of pledges by the Common law, pledges *to proſecute*, and by the ſtatute pledges *to make return*. *Co. Lit.* 145. *b.* Two ſorts of pledges in replevin.

And *note*, the ſheriff muſt take ſureties, and not a pawn. No pawn.

Therefore where one brought a replevin, and the value of the goods taken was 20*s.* and the bailiff took 3*l.* 10*s.* for pledges, and not ſureties, the party brought an action on the ſtat. *W.* 2. and reſolved that the action lay. *T. Jones* 378.

If pledges of *Proſequendo* are not found, and judgment given, the proceſs is erroneous. 9 *Co.* 71.

But theſe pledges may be found to the ſheriff, or in court, at any time before judgment, but not after. When pledges may be found.

But at this day the ſheriff, or the bailiff in his name, is to take a bond both of the pledges and of the party too, at the time when the replevin is granted, both for proſecuting the ſuit, and alſo to make a return, *&c.* according to the condition. *Treat. Diſtr.* 8. How given at this day.

If upon the writ to have return of the beaſts of the pledges the ſheriff return *Nihil*, then may the plaintiff have a *Scire Facias* againſt the ſheriff, *to return him ſo many beaſts*, or *ſo much chattels*; and ſo of a bailiff of franchiſe. *Cok. Mag. Chart.* 340. *Scire fac'* againſt the ſheriff upon the return of *nihil.*

But as to the pledges *to make return*, they are given by the ſtatute of *W.* 2. *c.* 2. and an action is given againſt the ſheriff if they are not found; but this does not make the proceedings erroneous. *By the whole court. T. Jones.* 19 *Vin. Abr.* 4. Action *v. vic'*

Pledges in replevin on *Retorno Habendo* were not taken by the ſheriff, according to the ſtatute of *W.* 2. 2. after the plaint was moved into the *Common* On a *Retorn' Habend.'*

Bench

Bench by *Recordare*, yet pledges may be found by the court. For the pledges given by the ſtat. of *W.* 2. are only to give remedy againſt the ſheriff for his neglect, and the pledges may be found at any time before judgment. *Cro. Car.* 594. *pl.* 10. 19 *Vin. Abr.* 4.

Withernam. Return.

If a *Withernam* be awarded for the plaintiff of the beaſts of the defendant, and the ſheriff returns he had taken the beaſts of the defendant in *Withernam*, but none comes from the plaintiff to have them. And now the plaintiff prays a writ to the ſheriff to deliver the *Withernam* to him; and the defendant prays, that the plaintiff gage *deliverance*, and ſaith, that part of the beaſts which he took are dead by the default of the plaintiff, and the remnant he is ready to deliver. In this caſe the plaintiff ſhall not have deliverance of the *Withernam* to him, but it ſhall remain in the cuſtody of the ſheriff, until a writ iſſue to the ſheriff for the plaintiff to have deliverance of his beaſts, and then it ſhall come in debate in whoſe default the beaſts are dead. 44 *Aſſ.* 15.

In what caſes the plaintiff ſhall not have deliverance.

Note; If *J. S.* be ſheriff, and the diſtreſs be taken by him, there the writ or plaint ſhall be in common form, naming the ſheriff by his Chriſtian name and ſurname, *which* J. S. *took*, and not *which you took*. And the ſheriff in that caſe ought to make deliverance. 3 *Inſt.* 139. *Reg. Orig.* 81. *b.*

Delivery by the ſheriff muſt be according to the writ.

A declaration in replevin was for 100 ewes and wethers, and it doth not appear how many there be of ewes, and how many there be of wethers; the ſheriff is bound to make delivery of the one ſort and of the other, for the delivery of the ſheriff muſt be according to the writ, *&c.* and the declaration was held ill. But ewes, without addition, had been good enough, and the ſheriff muſt have delivered the one ſort and the other: if the writ be for ewes *ſheep*, the ſheriff cannot deliver wethers. So if for black horſes, the ſheriff cannot deliver white, but is ſubject to action on the caſe. *Allen* 33. *Sty.* 71. 18 *Vin. Abr.* 580. *pl.* 10.

But notwithſtanding this caſe, it ſeems to be now ſettled, that a declaration in replevin being certain

to

a general intent is ſufficient, eſpecially if it be after verdict. 4 *Bac. Abr.* 386.

As where a replevin was brought, *quare defend' cepit bona & catalla*, (viz.) *quandam parcell' lintei & quandam parcell' papiri*, defendant avowed for rent; and after verdict for the plaintiff, exception was taken in arreſt of judgment, that the declaration was uncertain in not ſpecifying the quantities contained in the parcels; and *Parker* C. J. who delivered the opinion of the court ſaid, that the declaration would undoubtedly have been ill on demurrer, but that the defendant having avowed the taking the goods in the declaration, the avowry had cured the defect, as thereby both parties were agreed what the goods were; and the defendant himſelf having prayed a return of them, there was no controverſy between him and the plaintiff about them; and to oblige the plaintiff to a greater certainty, would have been of no ſervice to the defendant; for if he had demanded 500 reams of paper, and proved only one, he muſt recover; and as to the difficulty of delivering the goods upon a *Retorno Habendo*, he ſaid there was no weight in that objection, for the ſheriff, when he came to make a return, might have the defendant's aſſiſtance to ſhew him which were the goods; and he was not obliged to execute the writ without ſomebody attended to point out the things he was to deliver; and in this caſe that of *Allen* 33. was fully conſidered and over-ruled. *Ibid.* 387.

See ſtat. *Weſt.* 1. 3 *Ed.* 17. But he ought firſt demand that the cattle or goods be delivered to him. 5 *Co.* 93.

Scire Facias againſt the defendant, as late ſheriff, upon the ſtatute of *Weſtminſter* the 2d, for want of taking pledges on a replevin. The *Scire Facias* ſets out that one *William Points* brought replevin againſt the plaintiff, and that the defendant replevied the goods, and delivered them to the plaintiff in replevin, in which there was a *Recordare* to remove the plaint to the court of *King's Bench*; and thereupon the defendant, as bailiff, avowed for damage-feaſant, on which there is judgment by default againſt plaintiff and

The ſheriff's duty in taking pledges in replevin.

and his pledges, to have a return of the cattle and damages, on which iſſues a *Ret' Habend'*, on which the ſheriff had replevied, and delivered the goods without taking any pledges either to proſecute or to return the goods, againſt the duty of his office and the ſtatute; then a *Scire Facias* iſſues againſt the ſheriff why he ſhould not *tot bona & catalla*, &c. or the price thereof render to plaintiff, and demands *tot vel tanta*, or the price thereof, for not taking pledges; and the ſheriff pleads that he took goods, but does not ſay the ſame goods as in the declaration, and took ſufficient pledges, *viz.* the plaintiff and *J. S.* who entered into bond, with condition to proſecute with effect, and makes a return of the goods, but does not ſay the ſame goods as in the declaration, to which plea there is a demurrer.

How he is to plead.

And *by the court:* Judgment *pro quer'*, becauſe the defendant has not pleaded *ad idem*; for it appears the goods are different, and not the ſame as in the declaration: and they held that replevin bonds were good and legal, both to proſecute and to make return, and have been held ſo, and held that one pledge with the plaintiff was well. *Forteſc. Rep.* 331.

Entry of the plaint.

S— C—
County Court, } to wit.

At the county court of *T. F.* eſquire late ſheriff of the county of *S.* aforeſaid holden at *C.* in and for the ſaid county the day of in the year of the reign of our ſovereign Lord *George* the the Third, now King of Great *Britain*, and ſo forth, and in the year of our Lord 1764, before *R. L.* and *J.* ſuitors of the ſame court; it is thus contained amongſt other things,

J. J. eſq; complains againſt *W. M.* eſq; of plea of taking and unjuſtly detaining cattle, (to wit) of beaſts of the ſaid *J.* of the price

rice, and ſo forth, againſt gages and ſafe pledges, *&c.*

Pledges of the proſecution are, *John Doe*, and *Richard Roe*.

J. P. eſq; Sheriff.

Warwickſhire, to wit.

Precept of replevin.

Sir *A. B.* knight, ſheriff of the county aforeſaid, o the bailiff of the hundred of *H.* and alſo to my ailiff *J. S.* for this turn, and to each of them, ointly and ſeparately, greeting: Whereas *W. P.* ath found me ſufficient ſecurity, as well for proſeuting his claim, as for returning his beaſts, namely, ne ox, which *J. C.* took, and unjuſtly detains, as is ſaid, if a return of them ſhall be adjudged. Therefore I command you, and each of you, jointly nd ſeparately, on behalf of the King, that you cauſe o be replevied and delivered to the aforeſaid *W. P.* is aforeſaid ox, (or his beaſts aforeſaid, if ſeveral) nd that he puts by, or, *&c.* by ſureties and ſafe ledges, the aforeſaid *J. C.* ſo that he be at my next ounty court, to be held at, *&c.* to anſwer the foreſaid *W.* of the plea of taking and unjuſtly deaining his ox aforeſaid, and in what manner, *&c.* ou cauſe to be certified to me, at my next court, r, *&c.* under the pain to be incurred. Dated under the ſeal of my office, the day of, *&c.*

By me Sir *A. B.* knight, ſheriff.

If this replevin be granted by the deputy, then he uſt ſet his name to the replevin, thus:

By me *J. A.* one of the deputies of the ſaid ſheriff, according to the form of the ſtatute.

When ſuch a replevin is granted, there ought to e a bond taken of him to whom it is granted, or f ſome other for him, with one or more ſureties, hat he will proſecute the replevin. And by ſtat. Bond.

11 *Geo.* c. 19. *for the more effectual ſecuring the payment of rents, and preventing frauds by tenants*, all ſheriffs, *&c.* having authority to grant replevins, ſhall in every replevin of a diſtreſs for rent take in their own names from the plaintiff, and two reſponſible perſons as ſureties, a bond in double the value of the goods diſtrained, (ſuch value to be aſcertained by the oath of one, *&c.* credible witneſs, not intereſted in the goods or diſtreſs, which the perſon granting replevin is to adminiſter) conditioned for proſecuting the ſuit with effect, and without delay, and for duly returning the goods and chattels diſtrained, in caſe a return ſhall be awarded before any deliverance be made of the diſtreſs.

And the ſheriff, *&c.* taking ſuch bond, ſhall, at the requeſt and coſts of the avowant, or perſon making cognizance, aſſign the bond to the avowant or perſon aforeſaid, by indorſing it, and atteſting it under hand and ſeal, in preſence of two, *&c.* witneſſes. This may be done without ſtamp, provided the aſſignment ſo indorſed be duly ſtamped before any action brought thereon; and if the bond ſo taken and aſſigned be forfeited, the aſſignee may bring his action, and recover in his own name. And the court where, *&c.* may, by rule, give ſuch relief to the parties according to juſtice, ſuch rule to be a defeaſance to the bond. 11 *Geo.* 2. *c.* 19. *ſect.* 23.

Bond taken by a ſheriff to make return of cattle replevied, good.

Debt upon bond. Upon *Oyer* it appears, that the condition was, that if the defendant *Criſſop* ſhould appear at the next county-court, *&c.* and proſecute his action with effect againſt *J. S.* for wrongfully taking and detaining of his gelding, and ſhould make return thereof, if return ſhould be adjudged, and ſave harmleſs the plaintiff *Blackett*, ſheriff of, *&c.* by the delivery of the ſaid gelding, that then, *&c.* and upon this the defendant demurred. And it was argued, that this bond was void by the common law, for the ſheriff had not power before the ſtatute of *Weſtm.* 2. to take pledges; ſo that ſuch bond taken before the ſtatute of *Weſtm.* 2. had been without doubt void: and therefore it ſhall be void now, for the ſheriff has no authority by the ſtatute for this

practice. See *Dalton* 434. *Latch* 51. *Rol. Rep.* 314. But, *per Holt* Juſtice, there are two ſorts of pledges, *Plegii de Proſequendo*, and *Plegii de Retorno Habendo*. The pledges of proſecuting were at Common law, but thoſe *de Returno Habendo* were appointed by *Weſtm.* 2. *c.* 2. by which ſtatute an action lies againſt the ſheriff if he omits to take pledges, or if he takes thoſe that are inſufficient; for the party may have a *Scire facias* againſt the pledges, where the ſuit is in any court of record. And though in the county-court, *&c.* *Scire facias* will not lie againſt the pledges, becauſe theſe are not courts of record, and every *Scire facias* ought to be grounded upon a record; yet there the party may have a precept in nature of a *Scire facias* againſt the pledges: and this is the reaſon why the ſheriff cannot take gage inſtead of pledges. 1 *Cro.* 446. For the party has no remedy againſt the gage, as he hath againſt the pledges. And (by him and *Treby* Chief Juſtice) ſuch a bond will anſwer the intent of the ſtatute that requires pledges, for the obligors are ſureties. And *plegii* in the old book ſignifies ſureties. And this practice of taking bond, inſtead of pledges, is antient uſage. But (by them) the queſtion will not be in this caſe, whether the ſheriff can take a bond inſtead of pledges? as it would have been, if the party had brought an action againſt the ſheriff for not having taken pledges, and the ſheriff had pleaded, that he had taken this bond; but the queſtion now is, Whether this bond ſhall be void? And *by the whole court*, The bond is not void. At Common law it had been void, becauſe it had been to ſave the ſheriff harmleſs in making replevin by plaint, which he could not have done before the ſtatute of *Marlb.* *c.* 21. and alſo that the defendant ſhould make return of the cattle, to do which the ſheriff could not have taken pledges; and therefore he would have done what he ought not to have done. But now it is the duty of the ſheriff to take pledges to make return, and alſo to replevy by plaint; therefore the bond is lawful. For, by *Powell* Juſtice, where the ſheriff takes a bond or promiſe, to keep him harmleſs in the doing of a lawful act, the bond

Pledges.

Scire facias againſt the pledges.

A gage is not a pledge within *Weſtm.* 2.

A bond is a pledge.

Bond to ſave a ſheriff harmleſs, where good.

or promiſe is good; but if it be in the doing of that which he ought not to do, the bond or promiſe is void, and againſt law. *Lord Raym.* 278.

For form of a bond in replevin, and aſſignment thereof, ſee Appendix, *No.* .

Replevin bonds good and allowable by law, and uſual and common.

Theſe bonds, called replevin bonds, are given to ſecure pledges of both ſorts, pledges to make a return, and pledges to proſecute; and bonds are now in lieu of pledges. Here was debt on a replevin bond brought by the ſheriff, and the condition was, to appear at the next county-court, and there to proſecute her action with effect, and to make return of the goods and cattle, if return ſhall be adjudged by law, and to indemnify the ſheriff for granting the replevin, and delivering the cattle.

Defendant pleaded that ſhe did appear at the next county-court, and proſecuted there, and no return there adjudged.

Plaintiff replies, There was a *Recordari facias loquelam* into the court of *King's Bench*, but the defendant did not proſecute in the *Common Pleas*, but a return adjudged againſt her, and that ſhe had not returned the goods. *By the whole court:* This plea is nought, for it is not enough to proſecute in the county-court, but ſhe muſt follow it; and if a return be adjudged in any court, it is enough, for the condition is to go to the end of the cauſe: and held *by the court* to be a lawful bond, and ſuch is the uſual courſe now. *Forteſc. Rep.* 209, 210. *Fitzgib.* 158. 4 *Bac. Abr.* 377.

The effect of a replevin bond.

Debt on replevin bond, and upon *Oyer* the condition appeared to be, not only to proſecute with effect, and to make a return of the goods if a return be adjudged, but alſo to indemnify the ſheriff againſt all damages, by reaſon of granting the replevin. Plea, that he performed all the conditions. *By the court* and counſel agreed the plea was nought, for he ſhould plead he did indemnify.

Plea *performavit omnia*, ill.

Court: Judgment for the plaintiff.

Court: Replevin bonds held to be good, and are given to ſecure pledges of both ſorts, as well to proſecute, as to make a return. The foundation of this

Replevin bonds good, their effect.

this was a *Scire facias* againſt the defendant, as the late ſheriff, by the ſtatute of *Weſtminſter* the 2d, for want of taking pledges on a replevin.

Replevin bonds are now aſſignable by 11 *Geo.* 2. *c.* 19. atteſted under the ſheriff's hand and ſeal, in preſence of two credible witneſſes, and may be done without ſtamp, ſo that the aſſignment be ſtamped before action brought thereon. Remedy therein by rule of court. *Forteſc. Rep.* 210.

The effect of replevin bonds.

Theſe bonds are given to ſecure pledges of both ſorts, pledges to make a return, and pledges to proſecute; and bonds are now in lieu of pledges. This was debt on a replevin bond brought by the ſheriff, and the condition was to appear at the next county-court, and there to proſecute her action with effect, and that ſhe ſhall, and do make return of the goods and cattle, if return ſhall be adjudged by law, and to indemnify the ſheriff from granting the replevin and delivering the cattle: the defendant pleaded that ſhe did appear at next county-court, and proſecuted there, and no return was there adjudged. The plaintiff replies, There was a *Recordare facias loquelam* into this court, but the defendant did not proſecute in *C. B.* but a return was adjudged againſt her, and that ſhe had not returned the goods.

By the whole Court: It is a naughty plea, for it is not enough to proſecute in the county-court, but ſhe muſt follow it; and if a return be adjudged in any court, it is enough, for the condition is to go to the end of the cauſe. *Forteſc. Rep.* 361.

Upon conſtruction of the ſtat. of *Weſtm.* 2. *c.* 2. it was held, firſt, that an action of the caſe will lie againſt the ſheriff for taking inſufficient pledges, and is a proper remedy to be purſued; for though it is not particularly mentioned in the ſtatute, as being a ſort of action, but little in uſe at the time of making it, yet of late it is become frequent, being found to be an eaſier and more expeditious method of proceeding. Beſides, it appears from *Cro. Char.* 446. *Yo.* 378. that caſe will lie for taking no pledges at all; and the action ſeems to be equally proper where inſufficient pledges are taken, eſpecially as ſuch pledges

are always conſidered as none, according to 2 *Inſt.* 340. Adjudged upon a writ of error out of the county of *C. B.* in an action brought againſt the ſheriff of *Middleſex*. 16 *Vin. Abr.* 399. *pl.* 4. See 4 *Bac. Abr.* 378.

Nonſuit. *Secondly*, It was held that an action of the caſe will lie againſt the ſheriff for taking inſufficient pledges, ſetting forth a return. *Habend'* awarded, and an *Elongat'* returned, without firſt bringing a *Scire facias* againſt the pledges taken; for though (*a*) ſome books mention ſuch a previous ſtep, yet as the ſtatute does not direct it, nor does any caſe ſay it is neceſſary, it would be hard to require ſuch a circuitous way of proceeding. Accordingly the judgment given in the court of *C. B.* againſt the ſheriff was affirmed. 16 *Vin. Abr.* 400. *pl.* 5.

Nonſuit. If the ſheriff delivered goods, and the plaintiff become nonſuit, if the defendant be ready in court to avow the taking, how he ſhall make his avowry, *Dalt. Sher.* 508, *&c.* and the ſheriff muſt inquire of the value of the diſtreſs. So if there be a judgment upon a demurrer.

Accedas ad curiam Recordari facias loquelam. If falſe judgment be given in any other court-baron than in the ſheriff's county-court, then the writ of falſe judgment is called *Accedas ad curiam.*

By this writ the ſheriff muſt make a record of the plea a ſuit, in the preſence of the ſuitors, and annex the record ſo made to the back of the writ, and return and certify the ſame under ſeal, and the ſeals of the four ſuitors.

Note; Nothing but the plaint ſhall be removed, if they be at iſſue.

Return. It's a good return, that after the receipt of the writ, and before the return thereof, no court was

(*a*) 2 *Inſt.* 340. *F. N. B.* 74. (F) *Br. Sci. fa.* 3. 2 *H.* 6. 15. *Raſt.* 569. *b. Co. Ent.* 637. *Skin.* 244. If the ſheriff upon a replevin takes pledges *de Retorn' Habend'*, and upon a return awarded, returns *Quod Averia Elongata ſunt*, and then a *Scire facias* is brought againſt the pledges, and a *Nihil* is returned, an action lies againſt the ſheriff; *or*, I may have an action againſt him upon ſuggeſtion of this matter. 16 *Vin. Abr.* 400. in notes.

holden,

holden, or that the Lord would not hold the court, or that the ſuitors would not deliver him the record.

George the *Third*, by the grace of God, of *Great Britain*, *France*, and *Ireland*, King, Defender of the Faith, *&c.* to the ſheriff of *S.* greeting. We command you, that in your full county you cauſe the plaint to be recorded, which is in the ſame county, without our writ, between *J. J.* eſq; and *W. M.* eſq; of the cattle, goods, and chattels of the ſame *J.* taken and unjuſtly detained, as it is ſaid, and that you have the ſame record before our juſtices at *Weſtminſter*, from *Eaſter* day, in *fifteen* days, under your ſeal, and the ſeals of four lawful knights of the ſame county, of ſuch as ſhall be preſent at the ſaid record; and that you prefix the ſame day to the parties, that then they may be there ready to proceed in the ſaid plaint as ſhall be juſt, and have you there the names of the ſaid four knights, and this writ. Witneſs Ourſelf at *Weſtminſter*, the day of in the year of our reign. Let this writ be executed, if the ſaid *J.* deſires it, and not otherwiſe. *Recordari facias loquelam.*

The ſheriff muſt openly read this writ in court, and return the ſame under his own ſeal, and the ſeals of four ſuitors, and to ſummon the defendant to appear at the day of the return.

By virtue of this writ to me directed in my full county, held at *C.* in the county of *S.* within mentioned, on the day of in the year within written, I have cauſed the plaint to be recorded, which is in the ſame county, without the King's writ, between the parties within written, whereof mention is within made, which ſaid plaint appeareth in a certain ſchedule to this writ annexed. And I have that record before our Lord the King's Juſtices at *Weſtminſter*, at the time within mentioned, under my ſeal, and the ſeals of *R. L. J. D. N. G.* and *N. H.* four lawful knights of the ſaid county, who were preſent at the ſaid record; and I have prefixed The ſheriff's return indorſed.

prefixed the ſame day to the parties within written, that then they may be there ready to proceed in the ſaid plaint as ſhall be juſt, as within I am commanded. *J. P.* eſq; ſheriff.

The ſheriff may ſend an *Accedas ad curiam* by a ſervant, and need not deliver it in perſon. 3 *Keb. Rep.* 249. *pl.* 70. So ſaid by *Hale* Ch. Juſt.

Sheriff may juſtify by grant of a replevin, without ſhewing the property of the goods to be in the plaintiff.

Treſpaſs for taking two bullocks, *&c.* of the plaintiff. The defendant, as to all but the taking the ſaid bullocks, pleads Not guilty; and as to the taking them, he juſtifies, for that before the taking, the other defendant, *Evan Watts*, came before him, then ſheriff *com' Radnor*, and made his complaint againſt the plaintiff in a plea of taking and unjuſtly detaining the cattle, and found pledges to proſecute the ſaid plaint, and to return the cattle, if a return ſhould be adjudged, and prayed a warrant ro replevy the ſame: whereupon he made his precept to the other defendant *S. P.* his ſpecial bailiff, to replevy the ſame; and the plaintiff ſhould appear at next county-court to anſwer the ſaid *Evan Watts* in the ſaid plea; which precept, before the return, and before the taking, he delivered to the ſaid *S. Price*, who by virtue of it, at the time and place in the declaration, took the cattle, and the plaintiff not claiming property, delivered them to the defendant, and ſummoned the plaintiff to appear at the next county-court, to anſwer *Watts* in the ſaid plea, for taking and diſtraining his cattle, and then returned his precept executed as aforeſaid, he being ſheriff at taking and returning of precept, which is the ſame taking, *&c.*

The defendant, *Evan Watts*, pleads Not guilty generally.

Defendant, *Selby Price*, as to all but taking, pleads Not guilty; and as to that juſtifies by virtue of the precept *ſupra*.

The plaintiff demurs to both pleas, and ſhews for cauſe, that the defendants do not alledge that the cattle were the proper cattle of the ſaid *Evan Watts*,

or

or that he claimed property or title to them, or that they were in his poſſeſſion, or ſhewn by him to the ſheriff or bailiff, or were diſtrained by the plaintiff out of his poſſeſſion.

Secondly, That the plea doth not mention what pledges by name were found.

Thirdly, That it is not alledged plaintiff had notice of the plaint or replevin.

Fourthly, That the plea amounts to the general iſſue.

The defendants join in demurrer.

As to the firſt cauſe of demurrer, the defendants who juſtify are officers, who cannot know in whom the property of the cattle is. By ſtat. *Marl.* 52 *Hen.* 3. 21. *Si averia capiant' vicecomes poſt querimoniam ſibi fact' deliberare poſſet*; and therefore it is agreed, that it becomes the ſheriff's duty upon ſuch complaint by parol, or by precept to his bailiff, to replevy them. And ſuch precept may be given before any county-court. It is true, ſuch plaint ought after to be entered; but who is to enter it? He that makes the complaint, not the ſheriff. If then the plaintiff does not enter it, ſhall his neglect ſubject the ſheriff to an action? The ſheriff might lawfully make ſuch precept before the plaint entered; ſuppoſe he does ſo, and the party, from whom the cattle are taken, before the next county-court brings his action, ſhall he be liable to it, for doing what he lawfully might and ought to do?

In caſe the perſon from whom the cattle are taken hath property, the law gives him a proper remedy; if he claim property before the ſheriff, he muſt return it, and on ſuch return a writ *de proprietate probandâ* iſſues; and if found for the claimant the ſheriff can proceed no further. But if the plaintiff had property, and omitted to claim it before the ſheriff, he might plead property in himſelf, or in an ſtranger, either in abatement or in bar.

Now here the plea expreſly ſaith, that the plaintiff claimed no property before the ſheriff, and that he was ſummoned to anſwer the other defendant. *Evan Watts* in a plea of taking and detaining his

cattle, whereby although he did not make his claim before the ſheriff, he might have appeared and inſiſted on it by plea.

As to what is ſaid, that the ſheriff doth not ſhew by his plea, that the defendant *Evan Watts* was poſſeſſed of the cattle, or had diſtrained them; the ſheriff had no authority, and conſequently no cauſe to inquire into the defendant's right or title to the cattle; if the plaintiff had claimed property, he could not have determined it without a writ of *proprietate probandâ*, and upon ſuch writ, if it had appeared the ſaid *Watts* had no property, though he had poſſeſſion, he could not have replevied the cattle.

As to the ſecond cauſe of demurrer, that the plea doth not alledge what pledges were found, and who by name. It is true, in replevin by writ the ſheriff muſt take pledges, and thoſe pledges are liable; for if a return be adjudged, and the cattle not returned, a *Scire facias* lies againſt the pledges; and if the ſheriff returns *nichil*, a writ ſhall be ſued againſt him to anſwer the value of the cattle. 1 *Inſt.* 340. *Co. Lit.* 145. And therefore if the ſheriff doth not take pledges in replevin by writ, it is error. And an action on the caſe lies againſt him for his default. And therefore in ſuch caſe there might be reaſon the ſheriff ſhould ſhew what pledges he hath taken. But in a replevin by plaint the ſheriff is not bound to take pledges. And therefore his omiſſion to take them is not error. Yet if the ſheriff doth take pledges, a *Scire facias* lies againſt them, if the cattle be not returned. But whether the ſheriff was obliged to take pledges or not, what need hath the defendant to ſet forth the names of the pledges in his plea? for the defendant only juſtifies the taking of the cattle, which the plaintiff claims to be his, becauſe he was ſheriff of the county of *Radnor*, and as ſuch was bound to give replevins *ſuper querimon' ſibi fact'*, and he did ſo accordingly; and being required by ſtat. *W.* 2. to take pledges on granting ſuch replevin to make return as well as to proſecute, he ſaith he did ſo, whereby the

e plaintiff was ſecure of having his cattle again if return ſhould be adjudged; but who thoſe pledges ere is not at preſent material, ſince here appears as t no cauſe why a *Scire facias* ſhould be awarded ainſt them.

As to the third cauſe of demurrer, it is expreſly id by the plea, that the precept required the offi- r to ſummon the plaintiff to appear and anſwer e other defendant *Evan Watts* at the next county- urt in a plea of taking and detaining his cattle, d that *Selby Price* the officer ſummoned him ac- rdingly; what other notice ſhould the ſheriff give ſuch plaint or replevin?

As to the fourth cauſe of demurrer, that the plea nounts to the general iſſue, it does not appear but at the plaintiff may have the property of the cat- for which this action is now brought. It is ad- itted, that the plaintiff had the poſſeſſion in them, d that upon the defendant *Davis* his command they re taken out of his poſſeſſion by the other defen- nt *Price*, and conſequently if they had pleaded Not ilty, the plaintiff muſt recover; for it had been ficient for him to prove that the plaintiff had the ttle in his poſſeſſion, and the defendant took them, leſs the defendants could ſhew ſome matter to tify, or excuſe the taking; but ſuch juſtification excuſe muſt be pleaded, and could not be given evidence upon Not guilty.

Treſpaſs for a horſe, the defendant pleaded that biſhop of *Sarum* had right to grant replevins in h a manor; that the horſe was *A.'s*, and the intiff impounded him, and the defendant took n by virtue of a replevin; it was held very right- the plea amounted to the general iſſue, for the a admits no property or poſſeſſion in the plaintiff, d conſequently he had no colour of action, for the plaintiff's taking and impounding the horſe, horſe was not in his poſſeſſion, but in the cuſ- y of the law, and conſequently no juſtification dful.

f ſaid the plea admits the property in the plain- , and then the cattle could not be taken from n by a replevin without ſhewing ſome cauſe for

it, it is tantamount, as to ſay, the ſheriff ought not to grant a replevin, unleſs the party praying it hath juſt ground of action. But what authority to examine into or determine that point? If the party who hath the cattle claims property, the ſheriff cannot determine it without a writ *de proprietate probandâ*; and then if the property be found for the party claiming it, it is but an inqueſt of office, and the party who made the plaint may after ſue out writ of replevin, to which property may be again pleaded.

Trover for taking his ſheep; the jury found *A.* agreed to depaſture his ſheep with *B.* for ſome time and then if *B.* would give ſuch a price he ſhould have them before the time; *A.* ſells them to the plaintiff, *B.* afterwards ſells them to *C.* who brought a replevin for them, and the defendant, his ſervant in aſſiſtance of the ſheriff's officer, drove them to his maſter's ground, and though the plaintiff demanded them, refuſed to deliver them. And though the court held the property was in the plaintiff, yet gave judgment for the defendant, for he entered in execution of the legal proceſs, which is a juſtification to him as well as the officers.

Theſe things occurred on reading the paper-book, but it was again argued by ſerjeant *Draper* for the plaintiff, and Mr. *Bootle* for the defendant.

Serjeant *Draper* inſiſted, that the plea was ill, for it ought to have ſhewn that *Watts* who ſued the replevin had property in the goods replevied; for though the defendant *Davis* be an officer, he ought to ſhew he had authority to take the goods, and that his authority was duly executed; now his authority is by ſtat. *Marlb.* which requires *ſi averia alicujus capiant & injuſte detineantur vicecomes replegiare poſſet*; ſo there muſt be a perſon whoſe cattle are taken, there muſt be an unlawful taking, otherwiſe the ſheriff hath no authority. *Watts* appears not to have any right to the cattle, or that he claimed as much as claimed the property of them; the plea ſhould ſay they were *averia ſua*; therefore in

a replevin pending for the ſame treſpaſs is a plea.

condly, the party ought to ſhew the cattle to heriff, till when he is not bound to replevy ; for it is a good return *quod nullus venit ex quer' ad monſtrand' averia. Dal.* 277. *Kelw. b.* So the ſheriff ſhall not return till the *pluries*, hen he is excuſed, on the *pluries* he may return laim of property, till ſuch return the writ *de ietate probandâ* lies not, for it recites the *pluries*, uch writ muſt be brought by the plaintiff in it, for it cannot be by a ſtranger.

the ſheriff be ſhewn a ſtranger's goods, and them, treſpaſs lies againſt him, 2 *Rol.* 552. and otherwiſe a ſtranger could not have re-, though all his goods are taken away; and it d be the moſt miſchievous thing poſſible, for heriff might ſtrip a man's houſe, and he would no remedy; he cannot have *proprietate pro-*, becauſe a ſtranger, nor does it lie on replevin aint.

hirdly, the defendant ought to have ſhewn when unty-court was held; for otherwiſe how could laintiff, againſt whom the plaint was ſued, when or where to appear?

inferior courts it is not enough to ſay, that arty is adjourned to the next court, unleſs it ewiſe ſhewn at what time and before whom court is to be held.

anſwer to which it was argued, that it lay not knowledge of the ſheriff in whom the right cattle replevied was; and if he ſhould ſay he property of the goods did belong to *Evan*, it would make the plea amount to the ge- iſſue.

on which the court inclined to think the plea ood notwithſtanding the objections inſiſted on; many caſes had been cited by the counſel, time aken to conſider them to a further day in the term, when I delivered the judgment of the for the defendants. *Com. Rep.* 590. *pl.* 258.

This

Juſticies. This writ iſſues out of *Chancery*, directed to the ſheriff, giving him power to hold plea in this court for actions of 40*s.* or above, in *debt*, *detinue*, *&c.* and other actions perſonal. It is ſo called, because it is a *commiſſion*, (and not an *original*) to the ſheriff to do a man right and juſtice; it is *vicountial* and not returnable. And though it be directed to the ſheriff, yet the ſuitors are judges, and the writ

Returns. of *falſe judgment* lies on their erroneous judgment, and it requires no return, unleſs the action be removed by a writ of *recordare*, and then the writ muſt be returned, together with the record.

In what actions. In a *juſticies*, the plea may be holden of *account*, ſo of *admeaſurement of dower*, *admeaſurement of paſture*, when a commoner puts in more cattle than he ought; ſo of a writ of *covenant*.

So *juſticies de curia claudenda*, that is, where a man ought to incloſe his ground againſt his neighbours ground; ſo of *debt*, for money, or other goods and detinue: ſo a *juſticies* of *nuſance*, of *treſpaſs*; by *juſticies* of *treſpaſs*, the ſheriff may hear and determine of the treſpaſs by an inqueſt of twelve men according to the order of Common law: and the plaintiff may account to his damage of 20*l.* or more.

But if it be *with force and arms*, or *againſt the peace*, the ſheriff cannot determine it; therefore that is uſually omitted.

The ſheriff by *juſticies* may hold plea of a debt of 1000 marks, *&c.*

Juſticies for 40*l.* was held and determined before the under ſheriff, in the abſence of the ſheriff; and a writ of falſe judgment lies, and not a writ of error. 2 *Leon.* 34.

Sheriff's *tourn.* The *tourn* is a court of record, holden before the ſheriff. 2 *Inſt.* 143.

The nature of it. *Leet* is derived out of the ſheriff's *tourn*, and after the grant of this derivative *leet*, the ſheriff in his *tourn* is not to meddle in the reach of this *leet*, except in caſe of negligence of the *leet*, unleſs it be where the *leet* is forfeited to the king's hands. *Hawk. Pl. Cr.* 57.

one be under no particular *leet*, he is within heriff's *tourn*.

he ſheriff's *tourn* is the ſupreme *leet* of the y, and neglects of the *leet* are inquirable in *urn*.

The ſtile is,

ew of frank pledge of the lord the king, held before the ſheriff in his *tourn*, &c. [and not heriff's *tourn* held ſuch a day at *L.*] Stile.

or

The court of the view of frankpledge of the the king, at *B.* before the ſheriff in his *tourn* not the ſheriff's tourn held, &c. for *tourn* is ng but a perambulation.]

he *tourn* is incident to the office of ſheriff. 7 *Abr.* 1.

othing ſhall be inquired before the ſheriff in the but actions popular, common nuſances, affrays lood. 4 *Hen.* 6. 10. Juriſdiction

ſault made on a man is not inquirable there, it but a *tort* to a particular perſon, for which *ſs* lies. 4 *Hen.* 6. 10. Aſſault.

he ſtopping of water, which is a nuſance to the ry people, may be inquired there, for it is po- : ſo of a bridge. 4 *Hen.* 6. 10. Nuſances.

ey may amerce for common nuſances; and y ſtewards of *leets*, notwithſtanding the ſtat. *arlb. c.* 18.

he find in his *tourn*, that a perſon erected a *ſture* in the king's highway, he may abate it. *d.* 3. 21. *b.* *Purpreſtures.*

hat is preſentable in a franchiſe; as default in ing a cauſey, is not preſentable in the *tourn*, be- out of his juriſdiction being in the franchiſe: the default be in the lord for not repairing it, nay be preſented in the *tourn*, becauſe the fran- was firſt derived out of the *tourn*. *Cro. Jac.* *pl.* 13. In what caſes the ſame is preſentable in a franchiſe, &c.

the ſtatute of 1 *Ed.* 4. *c.* 2. the preſentment be by the ſheriff at the next quarter-ſeſſions, here ſhall be inrolled, and upon this they aſſeſs nes and amercements, and ſhall make proceſs Preſentment.

to

to levy it to the uſe of the ſheriff. *W. Jones* 3[illegible] *pl.* 3. *Cro. Car.* 275. *pl.* 13.

Where the *tourn* is to be kept. By the ſtatute of 21 *Ed.* 3. *c.* 15. the *tourn* ou[illegible] to be kept within a week after the feaſt of *Eas*[illegible] and after the feaſt of St. *Michael.* 31 *Ed.* [illegible] *c.* 13.

Who amerceable. Not a baron; not tenants in Ancient demeſ[illegible] 2 *Haw. Pl. Cr.* 57.

The buſineſs of the *leet* hath declined for ma[illegible] years; and is devolved on the quarter-ſeſſions. *Burn's Juſt.* 4to. 85.

For more of the *tourn* of the ſheriff, ſee 4 [illegible] 259, 260. *cap.* 53.—*Prynn's Animadv.* on 4 [illegible] 189, 190.—*Preface to* 9 *Rep.* 2. *b.*—And [illegible] 2 *Hawk. Pl. Cr.* 55. to 72. as to th[illegible] followi[illegible] points; 1ſt, the original inſtitution of the cou[illegible] 2dly, At what time, and in what place it muſt [illegible] holden. 3dly, What perſons owe ſuit thereto. 4th[illegible] What authority the ſheriff (or his ſteward) hath [illegible] judge of it. 5thly, What kind of offences are i[illegible] quirable in it. 6thly, Within what place ſuch [illegible] fences muſt ariſe. 7thly, By what jurors, and [illegible] what manner indictments in it ought to be fou[illegible] 8thly, In what manner they are to be traverſed a[illegible] determined. 7 *Vin. Abr.* 5. *pl.* 3.

Hundred court. It is derived out of the county-court, for the e[illegible] of the people, as the *leet* was out of the *tourn.*

The ſtile is thus.

The court of Sir *E. C.* knight, of his hund[illegible] of *B.* held in the county of *B.* before *J. S.* ſtew[illegible]

For more of the hundred court, ſee *Crompt. J[illegible] riſdiction of Courts* 231. 4 *Inſt.* 267. *chap.* 56. *Vin. Abr.* 324.

CHA[illegible]

CHAP. VI.

Bail.

BAIL is ſo called, becauſe the party bailed is delivered by law into the cuſtody of thoſe that his bail, and who are to anſwer the plaint if y do not produce the principal to do it. *Compl. r.* 108.

Upon an action againſt one in execution in cuſtody of the *marſhal* of the *Fleet*, &c.

Now one that is in execution in cuſtody of the *arſhal* of the *King's Bench*, is not compellable to d bail, if another action be brought againſt him; if he be in the *Fleet* on execution, and an action brought againſt him in the *King's Bench*, he muſt her be removed and committed to the cuſtody of marſhal, or elſe he muſt put in bail to the action. *ib.*

Who ſhall take bail in *London*.

It is the common courſe of *London*, upon plaint ore the ſheriffs, and a precept to the ſerjeant to eſt one, the ſureties ſhall be found and offered to ſheriffs, not to the ſerjeants. So in inferior *yors* courts. *Id. ib.*

Therefore in falſe impriſonment the defendant ads the *cuſtom* of *London*, that on entry of a int in *London*, a ſerjeant may by parol, or erwiſe, arreſt the defendant to anſwer the plain- ; and ſhews, that *J. S.* entered a plaint in *Compter* againſt the now plaintiff, and that he s a ſerjeant, and arreſted him and carried him to *Compter* till he found ſufficient bail. The plain- confeſſed the cuſtom, the entry of the plaint and eſt, and that he offered ſecurity to the ſheriff; d of this he gave notice to the defendant, and yet carried him to the *Compter*. The defendant de- rs. *Court*, The ſerjeant, upon tender of bail to ſheriff, is not bound to ſet the party at large, leſs the ſheriff ſend a warrant teſtifying this to n. *Cro. Car.* 196. *Rol. Abr.* 561. *T. Jo.* 6.

The

The ſame point agreed, where an arreſt was upon a plaint in the court of *Nottingham*, and the defendant in gaol under cuſtody of the mayor, and not of the ſerjeant. *Cro. El.* 77.

Where the mayor is both judge and gaoler.

In all corporation courts, the mayor who is judge, is gaoler alſo; that bail being a matter of record, cannot be found before any but the judge of the court, and not before the ſerjeant, though alledged *ſecundum conſuetudinem villæ*. But bail for appearance only, may be taken by the ſerjeant. *Cro. Jac.* 94, 95. *Cro. El.* 168.

Capias for the good behaviour.

If a *capias* for good behaviour be directed to the ſheriff by the juſtices of aſſize, and upon this the ſheriff makes a warrant to *J. S.* to take him, who took him accordingly, and the party tenders *J. S.* ſufficient bail for his appearance; and *J. S.* refuſes it, and keeps him in cuſtody: This makes him not a treſpaſſer *ab initio*; for it is not his office to take bail, but the ſheriff's. 2 *Rol. Abr.* 562.

Bail for one taken by *cap' excom'*.

Neither the ſheriff, nor any juſtice of the peace, can bail one taken by a writ of *cap' excommunicat'*, but he is bailable by the *King's Bench*. *Bulſtr.* 122.

Teſtatum.

Capias muſt be taken out, and ſealed and delivered againſt the bail, before he can be taken by a *teſtatum* in another county; and becauſe it was never delivered to the ſheriff, but all returned in one term, the execution was ſet aſide. 2 *Keb. Rep.* 424. *pl.* 58.

Scire fac' againſt the bail, return.

The *Scire facias* againſt the bail, uſually is left four days with the ſheriff before the return of it; but if it be not, it is well enough. 2 *Keb. Rep.* 229. *pl.* 1. *Salk.* 599. *Barnard. K. B.* 364. See *Poſtea Chap.* 7. *P.*

Return of *Scire facias* againſt the manucaptors.

Judgment in a *Scire facias* againſt manucaptors, the bail is liable by the judgment; and if they be freeholders in the ſame county where the recognizance is made, then they muſt have notice and time, becauſe the *Scire facias* may be returned: but if they be ſtrangers, the ſheriff is not bound to warn them, or give notice, but return *nihil* on both together; for this is but of favour to the bail, who at their

Notice.

per-

il ought to bring in the principal. *Compl. Sher.* 1.

In action brought againſt the *baron* and *feme*, and husband is only arreſted, yet the huſband muſt t in bail for his wife, if the name of the wife be the writ, elſe he is not bound to put in bail for r; for it is the writ that warrants the bail. *Mod.* p. 8. *pl.* 25. *Rep. and Caſ. of Pract. C. P.* 117. rnes's *Notes C. P.* 59. 2 *Barnes* 74, 80. 6 *Mod.* , 105. 7 *Mod.* 10, 63. *Lev. Rep.* 1, 216. *Salk.* 4. *pl.* 3, 115. *Sid.* 20, 395. *pl.* 2. *Keb. Rep.* 9. *pl.* 171. 189. *pl.* 194. *Freem. Rep.* 210. *pl.* 6. *Latch* 224. *Styl.* 475. *Comb.* 355. 2 *Keb. Rep.* 2. *pl.* 4. See 10 *Mod.* 162. 2 *Stra.* 1167, 1237, 72. *Cro. Jac.* 445. *pl.* 23. *Cro. El.* 370. *pl.* 9. t. 86. *Cro. Car.* 58. *pl.* 2. *Lit. Rep.* 18. *Dy.* 1. *b. pl.* 27. 12 *Mod.* 444, 445. *Leon.* 138. 189. *Bac. Abr.* 210. *Goldſb.* 127. See *Chap.* 5. *reſt.* By huſband for his wife.

The huſband is not bound to put in ſpecial bail his wife, if ſhe be not arreſted; but he muſt ear for himſelf and his wife, and muſt find ſpe- l bail for himſelf. *Keb. Rep.* 241. *pl.* 82.

Where bail is put in *de bene eſſe* (as in a judge's mber) the plaintiff cannot ſue the ſheriff's bond it be refuſed or ſet aſide; but he ought to ex- t againſt it in the judge's chamber. *Keb. Rep.* 8. *pl.* 5. Exception muſt be within 20 days after tice. *Keb. Rep.* 690. *pl.* 3. Bail *de bene eſſe*.

Where, how and to whom commiſſions may granted to take bail in the country, in any ac- n or ſuits depending in the courts at *Weſtminſter*, d how ſuch bail ſhall be juſtified, ſee 4 *W.* & . *c.* 4. and hereupon 20 days are allowed to cept. Commiſſions.

20 days to except.

" The ſheriffs and other officers and miniſters ſhall out of priſon all perſons in their cuſtody by force any writ, bill, or warrant, in any action perſo- , or by cauſe of indictment of treſpaſs, upon ſonable ſurety of perſons having ſufficient within counties to keep their days; perſons in ward by emption, execution, *capias utlagatum*, or *excom-* Perſons arreſted in actions perſonal, or indicted of treſpaſs to be bailed.

municatum, ſurety of the peace, and all perſons committed by ſpecial commandment of any juſtices except." Stat. 23 *Hen.* 6. *c.* 9. *ſ.* 1.

Explanation of ſtat. 23 *Hen.* 6. *chap.* 9.

This ſtatute is frequently pleaded in our books, and many caſes about the nature of this ſtatute; and the returns and pleadings thereupon we meet with, which if methodically digeſted, would be the better and more clearly explained.

Let us ſee how the Common law was before the making of this ſtatute.

At Common law, if the ſheriff had taken any man by the king's writ, he muſt not be delivered but by *breve de homine replegiando*, and he was not compellable to take bail of any. 2 *Saund.* 60.

To prevent extortion.

But this ſtatute compels him to take bail, and the deſign of this ſtatute is to provide againſt the extortion of ſheriffs, who would not deliver them without great ſums. *Cro. Eliz.* 808.

And diſcharge out of execution.

Yet if he was in execution, they would take ſuch bonds as they pleaſed, and let him at large. *Dal.* 518. *Plowd. Com.* 67. *b.*

Deſign of this ſtat.

Now the ſtatute preſcribes the form, and that the ſheriff, under colour of his office, ſhould not oppreſs the party to make him any other obligation, for the ſtatute makes the obligation void for not purſuing the form, but not in the matter thereof. The ſtatute was made for the priſoners benefit; for the miſchief before was, that the ſheriff not being compellable to bail him, would extort money to bail him. *Mod. Rep.* 228.

This ſtatute hath alſo three branches.

To whom it extends.

1. A commandment and authority to the ſheriff to let to bail ſuch perſons as are mainpernable: this extends to coroners, ſtewards of franchiſes, bailiffs, keepers of priſons, *&c.*

2. A reſtraining branch, that they ſhall not [illegible] to bail ſuch perſons as be in their ward by condemnation, execution, *capias utlagat'*, or excommunication, ſurety of the peace, and ſuch as ſhall be committed by ſpecial commandment of the juſtices, nor vagabonds.

3. T[illegible]

3. The third is, to make obligations void, taken in any other form than the ſtatute limits, *That no ſheriff, nor any of his officers and miniſters aforeſaid, ſhall take, or cauſe to be taken, or make any obligation for any cauſe aforeſaid, or by colour of their office, but only to themſelves, of any perſon, nor by any perſon which ſhall be in their ward, by the courſe of the law; but by the name of their office, and upon condition written, that the ſaid priſoners ſhall appear at the day contained in the ſaid writ, bill or warrant, and in ſuch places as the ſaid bill, &c. ſhall require: and any other obligation taken by them in any other form, ſhall be void.* The condition of bail bond for appearance.

Again there are three forms to be obſerved:

1. That it ſhall be made to the ſheriff himſelf. Three forms.

2. *Note*, theſe words (*For any other cauſe*) refer to all that went before, as well thoſe contained in the exception, as in the firſt branch. Therefore a bond taken of a man in execution, is void by this ſtatute, and the ſurety may plead, this was taken by him in execution as ſheriff, and the words, *colore officii*, make it void; for he lets him to bail who is not mainpernable. *Plowd.* 69, 80. Not of one in execution.

3. *Note* alſo (*nor any of his officers*); it is not ſo, and the printed ſtatute is miſtaken. It is not the ſheriff, nor any *de ſes officers* (*or any of his officers*), but not any *des officers*, not *ejus officiarii*, but *alii officiarii*, and ſo is old *Raſtal*, which is in *French*. *Compl. Sher.* 114. The ſtatute miſtaken in print.

In debt on bond to *Lanthal*, the defendant pleaded was for eaſe; it was held to extend to the marſhal, though he is not one *de ſes officers*, but one *des officers* and miniſters of juſtice. 3 *Keb. Rep.* 71. 14. Marſhal.

And if the ſtatute be miſrecited, it may be demurred to, as it was in this very caſe. *Cro. El.* 98. *pl.* 4. Miſrecital.

Again as to the three forms to be obſerved:

1. That it ſhall be made to the ſheriff himſelf.

2. That it ſhall be made to him by the name of his office.

3. That it ſhall be only for appearance at the day and place. *Cro. El.* 862. *pl.* 38. 2 *Ander.* 175. *pl.* 97. *Mo.* 636. *pl.* 875.

Sureties.

But as to the inſufficiency of the ſureties, that is matter, and not form, and the obligation is not void.

He muſt purſue the form, not the matter.

The ſtatute preſcribes the form, and that the ſheriff, under colour of his office, ſhould not oppreſs the party to make him any other manner of obligation; for the ſtatute makes the obligation void for not purſuing the form, but not in the matter thereof: therefore the ſheriff may take one ſurety, or one that has no land in the county. *Cro. El.* 624, 672, 808, 852, 862. *Cro. Car.* 446. *Forteſc. Rep.* 369. *Mod. Rep.* 32. 10 *Co.* 100. *Cro. Jac.* 186. *Com. Dig.* 506. *Lil. Abr.* 233. but *Plowd.* 69. and *Barnes* 46. *contra.* by *Hobart*, *ex relatione Twiſden:* becauſe the ſtatute would make ſure work, and not leave it to expoſitions what bonds ſhould be taken: therefore it was added, that bonds taken in any other form ſhall be void.

What obligations good or not.

1. In reſpect to the perſons and officers to whom they are made.
2. In reſpect of the form.

1. In reſpect of the officers or perſons to whom made.

To what officer, ſheriff or bailiff.

Such bond given to a deputy of a bailiff of a franchiſe is void, or to an under-ſheriff's deputy; it muſt be to the bailiff or ſheriff himſelf. *Noy* 69.

Serjeant at arms.

A ſerjeant at arms, attending on the preſident and council of the marches of *Wales*, is not an officer within this ſtat. *Cro. Car.* 309. *pl.* 10. *Style Rep.* 234.

Bailiff of an hundred.

If the bailiff of an hundred, which is a franchiſe, takes bond, he muſt do it in the ſheriff's name. 3 *Keb. Rep.* 71. *pl.* 14. 117. *pl.* 26. 125. *pl.* 42.

This bond muſt be taken to the ſheriff himſelf, and not to another. *Dy.* 119. 10 *Rep.* 100. *Plowd.* 68. *a. b.*

A

A ſerjeant at the houſe of commons is not within this ſtatute. *Keb. Rep.* 391. *pl.* 103. Serjeant.

This ſtatute doth not extend to a bond made to the plaintiff himſelf. *Al.* 58. If to the plaintiff.

The bond not being taken by the ſheriff in the name of his office, in debt upon the bond, the defendant demurs upon *oyer*. If not, in the name of office.

Sed non allocatur; for the ſtatute is not pleaded, and it may be for a juſt debt. 2 *Keb. Rep.* 620. *pl.* 11. *Cro. El.* 862. *pl.* 38. 2 *Rol. Rep.* 365. *Palm.* 371. *Saund.* 21. *R. Raym.* 357. Pleading the ſtat.

Marſhal and under-marſhal of the *King's Bench* is within this ſtatute, it is void. *Cro. Eliz.* 66. *pl.* 12. Marſhal of *K. B.*

A bond to *Neele*, ſheriff of *Warwick*, and the bond was to *Neele vic' com' præd'*; and *Warwick* put in the margin. By *Dodderidge*, this is not a good bond, he ought to be named ſheriff, and of what county. 2 *Rol. Rep.* 365. County in the margin.

The houſe of commons had voted one *W.* guilty of high treaſon, and the plaintiff being a ſerjeant at arms, took the ſaid *W.* into cuſtody; and the defendant entered into bond to the plaintiff, conditioned for the ſaid *W.*'s appearance, who did not appear. Debt was brought, and on demurrer, *by the court* it is a void bond by the Common law, being entered into for eaſe and favour of the priſoner, and he was not bailable. But the court agree, the plaintiff was not an officer within 23 *H.* 6. *c.* 10. Obj. The condition recites the bond was entered for appearance only, is an eſtoppel to ſay it was for other cauſe. *Court:* Here is no eſtoppel; for eſtoppel is when the bond is a good bond, then the recital is an eſtoppel; but when the bond is void, the eſtoppel is void too. *Hard.* 464. *T. Raym.* 62. *Keb. Rep.* 391. *pl.* 103. Serjeant at arms of the houſe of commons. Eſtoppel.

After *oyer* of two ſeveral ſheriffs bonds, defendant demurs. *Saund.* 290. And upon the argument it appeared, that three were jointly bound; and the plaintiff declared againſt the defendant ſingly, for which the defendant demurred; but it was anſwered, that it did not appear the other perſons had ſealed the bonds; and if not, then their bond was ſingle notwithſtanding; Three jointly bound, and declare againſt one ſingly.

notwithſtanding; and if in truth they had ſealed, then the defendant ſhould have pleaded in abatement, and that they were living, &c. And the whole court was of the ſame opinion. And judgment for plaintiff, unleſs cauſe, &c. See 6 *Mod.* 122.

Condition to appear and anſwer.

An obligation to the ſheriff to *appear* and *anſwer*, &c. is void by the ſtatute of 23 *H.* 6. *c.* 10. *aliter* to appear to anſwer; for the party by the law may appear, yet judgment may be given by default. *Noy Rep.* 54. *Hetl.* 117.

Condition to make an appearance, *quære* if good.

Given before the writ, &c.

Where a bond given to the ſheriff for appearance, (before the writ was delivered) was allowed good. *Keb. Rep.* 554. *pl.* 66.

Where the term is adjourned.

Obligation was taken by the ſheriff for an appearance at *Weſtminſter*, and the term was adjourned to St. *Albans*, and the party appeared there; he had not forfeited the obligation. *Mo.* 460. *pl.* 601. *Cro. El.* 466. (*bis*) *pl.* 16.

Relation.

The obligation ſhall alway relate to the day and place comprized, and he ought to appear at the *King's Bench*, or elſe he forfeits his bond. *Mo.* 466.

To anſwer as ſhall appertain, &c.

The condition was, if the ſaid *J. D.* perſonally appeared, &c. *à die paſchæ in* 15 *dies*, to anſwer to *J. H.* as ſhall appertain, and farther to do and receive as the court therein ſhall conſider in that behalf, that then, &c. it is a void bond. *Cro. Eliz.* 672. *pl.* 31.

Bond for appearance before proceſs comes.

If the ſheriff take an obligation for the appearance of *J. S.* before proceſs comes to him to arreſt *J. S.* and after the proceſs comes, this obligation is good. *Sid.* 151. *Keb. Rep.* 554.

Bail-bond was to appear at *Weſtminſter*, *on Saturday next after eight days of the Purification*, to anſwer, it is ill; it was intended the feaſt day. 3 *Keb. Rep.* 260. *pl.* 5.

Miſtake of the day.

Bill of *Middleſex* was returnable *on Friday*, the condition of the bail-bond was, if the defendant appeared *on Saturday*; it is a void bond. *Saund.* 21, 22.

Condition

Condition to appear and anſwer is good enough. *Cro. Jac.* 286. Though *Mildmay* and *Cage* his caſe was objected, being intended generally to anſwer any action, and the writ was of treſpaſs. 3 *Keb.* 422. pl. 16. To appear and anſwer.

The condition of the bond was, that if the defendant do appear *in Banco Regis* ſuch a day, then the condition of the obligation to be void; yet *by the court*, both are good. For if theſe words were omitted, it is but ſurpluſage. *Sid.* 456. *pl.* 27. 2 *Keb. Rep.* 625. *pl.* 24. *Mod. Rep.* 35. *pl.* 85. 2 *Danv. Abr.* 7. *pl.* 8. 25. *pl.* 5. 2 *Saund.* 78. *Intr.* 39. Inſenſible.

To a condition to appear before his majeſty's juſtices of the *King's Bench* at *Weſtminſter*; the defendant pleads the ſtatute of 23 *H.* 6. and that this was *ſecundum formam*; it ſhould be *coram dom' rege ubicunque*, &c. yet it was adjudged good. The ſtatute is not to be avoided by ſuch miſtakes of returns. 3 *Keb.* 551. *pl.* 59. 611. *pl.* 66. 627. *pl.* 15. To appear at *Weſtminſter*.

Condition was *ad reſpondend. E. exec'. in plac' Johannis' de* 100 *l. and the Writ was ad reſpondend' E. in placito treſp. ac etiam billæ* 100 *l. de debito*, &c. This variance is not material; if the bond be made in the name of his office, and the condition expreſs the time and place of his appearance, and at whoſe ſuit, it is enough. *Cro. Jac.* 286. pl. 2. *T. Jo.* 137. *T. Raym.* 220. 3 *Keb. Rep.* 11. *pl.* 18. 164. *pl.* 40. 2 *Jo.* 46. Variance allowed.

The condition is, if ſuch an one who is arreſted on a *latitat* appeared perſonally, and anſwered, &c. regard his appearance is neceſſary to put in ſpecial bail, if the party require it, the bond is good. *Cro. El.* 776. *pl.* 7. 10 *Rep.* 100. To appear perſonally.

A writ out of the *King's Bench* was returnable out of term, the ſheriff takes the party, and takes bond to appear at the day of the return, and for non-appearance brought debt on this obligation: his bond was void by the ſtatute; and the ſheriff ſhall not be amerced for non-appearance, nor liable to any falſe impriſonment by the party. 2 *Sid.* 129. *Intra.* 399. *Forteſc. Rep.* 363. *R. Raym.* 353. Appearance on a writ returnable out of term.

To anſwer *trans. acetiam billæ.*

The writ is *placito trans.* the condition of the bond is to anſwer *ac etiam billae* 100 *l. in placito debiti*, is void, being another writ; but if the writ were *in placito debiti*, or the bond taken only to anſwer the writ *in placito trans.* it were well enough. And a *nil capiat per billam* was awarded, on demurrer by the plaintiff upon the defendant's plea upon the ſtatute, it being *in aliâ formâ.* 3 *Keb. Rep.* 164. *pl.* 40. *Ventr.* 243.

Ad reſpondend' de placito debiti, without mentioning the ſum.

Ad reſpond' de placito debiti is good, without mentioning the ſum. The bond ought to be made to the ſheriff by the name of his office, and ought to expreſs the day and place of his appearance; and theſe circumſtances being obſerved, though it be variant in other circumſtances, it is not material. *Cro. Jac.* 286. ſee *p.* 23. *Stile* 257, 258.

The ſheriff cannot take bond to appear at another day than is contained in the writ. 2 *Keb. Rep.* 526.

Bond taken by the ſheriff after the day of the return.

If an obligation be taken by the ſheriff after the day of the return, it is void by the ſtatute, and is not a ſingle obligation; and the ſtatute was made to prevent ſuch great oppreſſions; for the party ſo taken after the ruturn, may not be bailed without coming before a judge; and he may not do this out of term without the conſent of the other party. *Sid.* 301. *R. Raym.* 349. *S. P.*

On attachment out of *Chancery.*

L. gives bond to the ſheriff, being arreſted by attachment out of the *Chancery.* The condition was, that the defendant ſhould appear ſuch a day in *Chancery, apud Weſtm. ubicunque fuerit.* This bond is

Variance.

within the ſtatute, but here the variance makes it void, *ubicunque fuerit.* 3 *Keb. Rep.* 191. *pl.* 40. 599. *pl.* 36. 614. *pl.* 75. *Styl.* 234.

Court of requeſts.

The ſheriff, by virtue of an attachment under the privy ſeal of the court of requeſts, took the defendant, and for his enlargement made the obligation to appear before the king's council, *&c. By the court:* Here is no warrant to take the body, or the obligation; for that court hath not any power by commiſſion, ſtatute or common law. *Compl. Sher.* 121.

Upon

Upon a bond iſſuing out of a court that had no authority to grant it, this bond was ſaid to be taken by *dureſs*, and ſo avoidable by the award of the court, *Cro. El.* 646. although it was alledged, that the ſheriff took it *colore officii*. *Per dureſs.*

So upon an attachment in *Chancery*. *Dalt.* 521. *Stile* 234. *Chancery.*

But the ſheriff ought to obey the proceſs out of the *Dutchy-court*, for that is appointed by act of parliament, but the other is not within the ſtatute; for the ſtatute ſpeaks of ſuch who are in their cuſtody by courſe of law. So this obligation is avoidable by *dureſs*. *Cro. El.* 646. 2 *Anderſ.* 122. *Dutchy-court.*

Plaint in a court-baron of 39*s.* and an attachment againſt the defendant's goods, and detained till the plaintiff cauſed a 40*l.* bond to be made to the plaintiff himſelf to appear and anſwer, and condemnation by a day, and pleaded the ſtatute of 23 *H.* 6. c. 10. this bond is void at Common law. Court-baron.

It is void alſo for extortion, becauſe of the unreaſonable ſum, *&c.* and the ſtatute doth not extend to ſuch a bond. *Keb. Rep.* 872. *pl.* 23. Extortion.

The condition was to appear before the juſtice of *K. B.* at *Weſtminſter*, and ſaith not *to hold pleas before us whereſoever*, *&c.* the variance is not material, and by common intendment it is the ſame court. *T. J.* 46. Not according to the ſtile of the court.

The ſtatute ſaith, that he ſhall take obligation with ſureties; but this is for the benefit of the ſheriff, that is for his indemnity; that if he be amerced for non-appearance of the party, he ſhall have his remedy, for he may take what ſureties he thinks fitting. *Mo.* 636. Sureties.

Therefore if the ſheriff take obligation for appearance, it is not void by ſtat. 23 *H.* 6. for inſufficiency of the ſureties, or that the ſurety had no land; for the ſheriff may take one ſurety or two. *Lev.* 86. *Com. Dig.* 506. *Lil. Abr.* 233. Bond not void for inſufficiency of ſureties.

An action upon the caſe againſt the ſheriff of *Middleſex* for an eſcape; to which the defendant pleaded *Not guilty*, and nothing appeared againſt the ſheriff, but that he took a bail-bond with one ſurety Bail how to be taken by ſheriff

only

only in the bond, *viz.* the party himſelf and another; and it was held well *per totam curiam*; and as to his not appearing at the day, no action will lie againſt the ſheriff, but he muſt be amerced. One pledge is ſufficient, where pledges are to be found. So in bail-bond, if the ſheriff take one bail, it is enough, though words of the act are ſufficient ſureties in the plural number; but in the caſe of a bail-bond, the ſufficiency of the bail is not traverſable. *Forteſ. Rep.* 369.

The ſheriff is judge of the ſufficiency, and it is no plea to ſay, he took bonds of inſufficient perſons. *Mo.* 118.

And though the ſurety be not an inhabitant in the county, nor had any eſtate there.

Party muſt be in ward.

The party that gives the bond, muſt be in the ward of the ſheriff. 10 *Rep.* 99. *b. Winch* 20, 50 *R. Raym.* 353.

The bond muſt be taken of the perſon who is in lawful cuſtody.

Condition to appear; the defendant on *oyer* pleads the ſtatute of 23 *H.* 6. that the plaintiff (bailiff of *St. Edmondſbury*) impriſoned the defendant without warrant, and thereon took the bond. *By the court*; It is an ill plea; for the bond muſt be taken of the perſon in cuſtody, *i. e.* lawful cuſtody; and this bond is voidable by *dureſs* at Common law. 3 *Keb. Rep.* 756. *pl.* 37. *Id.* 760. *pl.* 47. 2 *Jo.* 76.

To pay money in court.

The ſheriff upon a *fieri fac.* took bond of the defendant to pay the money in court at the return of the writ; this is good, and not void by ſtat. 23 *H.* 6. 10 *Rep.* 99.

What *colore officii* is, and to what it extends, or not.

Colore officii is taken in *malam partem*. Sheriff ſhall not take obligation contrary to the ſtatute *colore officii*, as one in execution eſcapes and is retaken, and then a bond is made for his enlargement, this is *colore officii*. But if a ſheriff take a bond for a true debt, this is good, becauſe it is not *colore officii*. 2 *Leon.* 118. *pl.*

By the ſheriff, of his clerk.

Debt on obligation taken by the plaintiff ſheriff, of the defendant his clerk, upon condition to pay the king's ſilver into the *Exchequer* within fourteen days after he received it. The defendant pleads ſtat. 23 *H.* 6. and averred it was taken *colore officii*. And

nd upon demurrer it was adjudged for the plain-
; for the ſtatute doth not intend ſuch obligation
en of them which are not to appear, nor in
ſtody. The plea that the bond is taken *colore*
cii, will not avoid a bond taken of the party to
what he ought. *Mo.* 542. *pl.* 717.

A bond for tuition of a child as a curator, and give account to the ordinary, is but a voluntary dertaking of the guardian, and ſo not within the tute 23 *H.* 6. and it is good at Common law, twithſtanding. 3 *Inſt.* 149. 3 *Keb. Rep.* 690. 44. Curator tutor.

Note; If the one part of the condition be accor-
ng to the ſtatute, and the other not, all ſhall be
d; for the ſtatute extends to the whole bond.
wd. 68. *b. Palm.* 378. The whole bond is void, if againſt this ſtatute in any point.

If the ſheriff take bond for a point againſt this
, and alſo for a due debt, the whole bond is
id. *Hob.* 14.

If it be good in ſubſtance, though not in ſome
cumſtances, yet within the ſtatute. *Cro. Jac.*
6.

Note; The warden of the *Fleet*, and the king's
ace at *Weſtminſter*, are excepted out of this act. Warden, *&c.* excepted.

is is a particular private law, and ought to be pleaded. Rule as to pleading the act.

Condition was, that *J. S.* appeared in *K. B.*
the defendant demands *oyer*, and ſo demurred,
auſe it is not taken by the ſheriff in the name of
office. *Sed non allocatur*; the ſtatute being not
aded, no exception can be taken againſt it, for it
y be a juſt debt. *Saund.* 155. *Sid.* 24. *Hob.*
contra. 3 *Keb. Rep.* 320. *pl.* 8. *Id.* 361.
36. Where not pleaded.

See *Saund.* 153, 155. Action againſt the late
riff for ſuffering an eſcape, and returning *Cepi*
us, &c. hereupon judgment was given for the
ntiff, and the reaſon thereof entered, becauſe the
ndant had not pleaded the ſtatute, and ſhewn
matter of fact, of which they would not take
notice, *Aliter* where not pleaded.

notice, unleſs it was pleaded. And juſtice *Twiſden* ſaid, it had formerly been ſettled ſo; yet he thought it ought to be ruled and ſettled otherwiſe, but the court would not recede from their former reſolutions and judgments: and therefore it was adjudged for the plaintiff.

Where the arreſt is in one county, and the bond taken in another county, this bond was ſaid to be out of the ſtatute; and the only proper remedy which the defendant hath to avoid it, is to plead by *dureſs* to it. *Cro. Jac.* 745.

Plea no ſuch cuſtom.

A condition to appear in *K. B.* according to cuſtom, at the ſuit of *M.* on *oyer* the defendant pleads, there is no ſuch cuſtom in *K. B.* as the plaintiff hath alledged, to appear to an *ac etiam billæ*, and ſo the obligation void. The plaintiff demurs, and judgment *pro querente*; becauſe the ſtatute of 23 *H.* 6. is not pleaded, being a particular law. But it might be pleaded the bond was by *dureſs*, being in another manner than the ſtatute allows; and that ſtatute makes the bond void for the whole. 3 *Keb. Rep.* 160. *pl.* 31. *Id.* 181. *pl.* 21.

Ac etiam billæ.

Dureſs.

Miſrecital.

If the ſtatute be miſrecited, it may be demurred to. *Sid.* 356. 2 *Keb. Rep.* 278. *pl.* 44.

Quære, How the court will take notice of it, by the printed book, or by the record, or otherwiſe?

Rule.

To plead an appearance, and not to ſay, prout patet per recordum, *is naught.*

On the ſheriff's bond it muſt be averred to be on record in the rejoinder, as well as in the bar. *Brownl.* 91. *Cro. El.* 466. 2 *Keb. Rep.* 205. *pl.* 41. *Sid.* 329. *pl.* 11. 2 *Keb.* 278. *pl.* 45.

Upon adjournment of the term.

Condition was, if he appeared at *Weſtminſter* ſuch a day, to anſwer, *&c.* The defendant pleads, that before the day of the return of the writ the term was adjourned to *Hartford*, and that there he appeared. The plaintiff demurs. *By the court*; he ought to conclude his plea, *prout patet per recordum*; for though he appeareth, yet if his appearance be not entered of record, he forfeits his obligation; and he ought to conclude his plea ſo, otherwiſe the plain-

cannot anſwer thereunto, as to ſay, *nul tiel re-*
d. Cro. El. 466.

Debt upon a ſheriff's bond for appearance in *K. B.* *Comperuit ad*
defendant pleads *comperuit ad diem*; the plaintiff *diem.*
nies it, and by *mittimus* out of the *Chancery* it
s brought into the *Common Pleas*, and judgment
re given. *Cro. Car.* 297.

Though the bond is made void by act of parlia- *Non eſt factum*
nt, yet the party may not plead *non eſt factum*, not to be pleaded.
t muſt plead the ſpecial matter, and take advan-
e of the act of parliament. 5 *Rep.* 117.

In debt upon bond, the defendant pleads the ſta- Traverſe, that
te of 23 *H.* 6. and ſhews that *W.* was in execu- he was in priſon
n, and that the bond was made for his deliver- *tempore confectio-*
ce againſt the ſtatute. The plaintiff replies, that *nis* not good.
pore confectionis of the ſaid bond *W.* was at
ge; *abſque hoc*, that he was in priſon *tempore con-*
ionis, &c. the traverſe is not good: for one may
in priſon, and make a promiſe to make a bond,
which he is enlarged, and within an hour after
makes the bond, the ſame is within the ſtatute;
ought to have been *abſque hoc*, that it was made
deliberatione. 2 *Leon.* 107. 2 *Keb. Rep.* 512.
5.

Debt on bond, dated 25 *Sep.* the defendant pleads Plead *primo de-*
apias ad ſatisfaciend' was awarded againſt *B.* who *liberat'* after the
s taken on it the 30th of *September*, and that the arreſt.
ligation was made for the enlargement of *B.* The
intiff demurs, and had judgment, becauſe it ap-
ars the bond was made before the arreſt, and ſo
uld not be avoided by 23 *H.* 6. but he ought to
ve pleaded it with a *primo deliberat'* after the arreſt.
y 23.

To debt on bail-bond to appear, the defendant Plea that before
ads, before the day he was taken by *capias utlagat'*, the day of ap-
d detained till after the day, and ſo could not ap- pearance he was
r; the plaintiff demurred; and it was adjudged taken by a *cap'*
be an ill plea; for the party may remove himſelf *utlagat'*.
habeas corpus, and if this ſhould be good, all bail-
nds may be thus avoided, and the plaintiff doth
t his duty. 2 *Keb. Rep.* 622. *pl.* 14. *Sid.* 456.
26.

In

In debt, the defendant pleaded the ſtatute of 23 *H.* 6. and that was for eaſe and favour, and not for a juſt debt. The plaintiff replies, it was for a juſt debt, *abſque hoc*, that it was for eaſe and favour. To which the defendant rejoins ſpecially, and the rejoinder was ſet aſide in the vacation by judge *Rainsford*; and the plaintiff entred judgment for not joining on the iſſue tendred by the plaintiff. And *by the court*; the judgment was affirmed. 1 *Keb. Rep.* 554. *pl.* 42.

Rejoinder ſet aſide, and judgment entred.

Rule. *For when an iſſue and rule is given, the other party muſt join, and cannot depart to any new matter.*

Traverſe time of the delivery of the bond.

A ſheriff brought debt on a bond, dated the 19th of *June*, the defendant demands *oyer* of the condition, which was, that if he appear *on Friday next after three weeks of the Holy Trinity*, and pleads that *Friday next after Trinity was* 14 *June*, and that he was impriſoned by the plaintiff till the 19th of *June*, and that the obligation *above was firſt delivered* by the defendant of *June*; *without this*, that this was delivered as his deed before the 19th of *June*. *Sid.* 300. *pl.* 6. 2 *Keb. Rep.* 108. *pl.* 45. 109. *pl.* 48, 122. *pl.* 74.

By the court; This is not a good traverſe; it ought to have been, *without this*, that it was delivered as his deed before *Friday next after three weeks of the Holy Trinity*; for if the traverſe above be allowed, the plaintiff ſhall be excluded from anſwering to the time alledged of the return, although it be falſe.

Traverſe time of the return.

The defendant pleads ſtat. 23 *H.* 6. and that he was in cuſtody by warrant of a writ returned on *Friday next after the octave of the Purification*; the plaintiff replied, the defendant was taken by a warrant on a writ returned *Saturday next after the octave of the Purification*, and not by any writ returned *Friday*, *&c.* The defendant rejoined, that he was in cuſtody by virtue of a writ returned *Friday after the octave of the Purification*, *without this*, that he was taken by any writ returned *Saturday after the octave*

Have. The plaintiff demurs. *By the court*; This no traverſe upon a traverſe, and there would be o traverſe in the replication, which would make n end, but in the rejoinder it doth. 2 *Keb. Rep.* 4. *pl.* 16. 195. *pl.* 39. *Saund.* 20. 3 *Keb. Rep.* 56. *pl.* 11. 191. *pl.* 40.

Debt on bond; the writ was *to anſwer* H. G. *te ſheriff of* Norfolk, and the count was, *that he knowledged himſelf to be bound to the aforeſaid* J. H. *the aforeſaid forty pounds*, and ſaith not, *then be- ſheriff of* Norfolk; and upon demurrer upon the r, it was adjudged *by the court, that it was in- fficient. Cro. Eliz.* 800. 3 *Keb. Rep.* 191. 40.

Special bailiff takes bond, it is by *dureſs.*

J. S. puts himſelf in a ſpecial bailiff, and arreſts *D.* and takes bond, *&c.* this is by *dureſs*, and e defendant may plead that; yet it is not within e ſtatute, nor aided by it. For *J. D.* was never the ſheriff's cuſtody after the arreſt, and the bond as taken out of the county where he was arreſted, d ſo by *dureſs. Cro. El.* 746. 3 *Keb. Rep.* 756. 37. 760. *pl.* 47.

After the writ purchaſed, and before the deli- very of it to the ſheriff, he may take ſecurity.

The defendant pleads to the ſheriff's bond, that ere was no writ ever delivered to the ſheriff, and would avoid it by ſtat. 23 *H.* 6. The ſheriff ter the writ ſent out, but before the delivery, takes curity: which *by the court*, he may, if the defen- nt will give it. *Keb. Rep.* 554. *pl.* 66.

Appearance after the day is good.

If appearance be the ſame term, it is good. The fendant pleads to a ſheriff's bond, taken for his pearance in *K. B. on Saturday next after the octave Saint* (*a*) *Martin*, and that he appeared at the y: and the court of *Common Pleas* gave him a day bring the record of his appearance by *Mittimus* t of the *Chancery*. And the record was certified, at he appeared *on Monday next after* 15 *days of int Martin*, which was after the day, and ad- dged good. *Brownl.* 58, 74.

(*a*) No ſuch return at this day. See ſtatute 24 o. 2. *c.* 48.

The

The parties appeared two days after the day in the condition; it is good, and ſhall be a diſcharge of the bond; for the whole term is but one day in law. So it is in the *Common Pleas*, and in the *King's Bench*. 2 *Bulſtr.* 255.

Appearance notwithſtanding *Superſedeas*.

A debtor having given bond to the ſheriff to appear, though a *Superſedeas* comes to the ſheriff before the day of appearance; yet he ſhall appear to take his bond.

A ſheriff ſues his bail-bond for non-appearance: the defendant pleads *that he appeared at the day*. The plaintiff replies, *no record of ſuch appearance*. The defendant rejoins, *that there is ſuch record*. Now the proof lies on the defendant's part, to produce the record in court.

How iſſue to be joined, *&c.*

Appearance to be tried by record.

A condition to appear in *K. B.* where the proceſs is returnable, *&c.* The defendant ſaid *in facto* that he appeared *according to the form, and this he deſires, and* repleader was awarded; for it muſt be tried by the record.

Of appearance when no proceſs is returned.

A. is bound to appear ſuch a day, *&c.* and *A.* at the ſaid day goes to the court; but there no proceſs is returned. Then the party may go to one of the chief clerks of the court, and pray him to take a note of his appearance. *Leon.* 90.

If the other party plead *Nul tiel record*, it behoveth that the defendant have the record ready at his peril: for the court of *Common Pleas* cannot write to the juſtices of the *King's Bench*, to certify a record thither.

On *Capias, Cepi corpus*, or *Non eſt inventus*.

After the ſtatute of 23 *H.* 6. the ſheriff could not make a ſpecial return in a *Capias*; but only a *Cepi corpus* or *Non eſt inventus*: and the ſtatute, though it compels him to take bail, yet it does not alter the return. The deſign of the ſtatute is to provide againſt the extortion of ſheriffs, being obliged to return *Cepi & paratum habeo*, and yet to let the defendant at large; and therefore there is no reaſon he ſhould be charged for not having the body at the day.

The

The return of a *Paratum habeo*, is in effect no ore than that he hath the body ready to bring into urt, when the court ſhall command him. *Paratum habeo.*

And for his falſe return of *Paratum habeo*, he is nerceable to the court till he do bring in the body nd the common practice is ſo); but that is no- ing to the party, and no action lies againſt him the party. *Mod. Rep.* 244. Sheriff amerceable, *Quouſq;* &c.

If the ſheriff refuſe to take bail, he is liable to an ion of falſe impriſonment. Refuſal of bail.

If the ſheriff refuſes to take reaſonable bail, an ion on the caſe lies againſt him. *Sid.* 23. Reaſonable bail.

If the ſheriff take inſufficient bail, yet no action againſt him by the party; for he is judge of the l. Inſufficient bail.

An action on the caſe againſt the ſheriff for eſcape: defendant pleads the ſtatute of 23 *H.* 6. that he *H.* to bail, and took reaſonable ſureties *A.* and perſons having ſufficient within the county. The intiff replies, *abſque hoc*, that he took bail, having icient within the county. The defendant de- rs, and judgment for defendant. *Mod. Rep.* 7. Caſe for an eſcape.

Where treſpaſs on the caſe was brought againſt ſheriffs of *Middleſex* for ſuffering an eſcape, and rning *Cepi corpus*, and *Paratum habeo* (which was); the defendants plead, that the party arreſted put *J. B.* and *J. C.* ſureties, and plead the ſtatute of *H.* 6. and they took bond according to the ſta- , and ſo let him eſcape. *By court*, The plea is d, for the reaſons aforeſaid. If the ſheriff re- a *Languidus in priſond*, having taken bail *ſecun- ſtat'*; it was adjudged, that though the defen- was at large, yet no action lay againſt the iff. All this muſt be underſtood of *Mean pro-* for elſe this would be to fruſtrate the ſtatute of *H.* 6. *Cro. El.* 852. Sheriff pleads ſtat. 23 *H.* 6. *paratum habeo.* *Languidus* returned. *Mean proceſs.*

ut *Note*, Then it muſt appear to the court he record, that it is on the ſtatute of 23 *H.* 6. not a return at Common law: and the ſheriff in ſuch caſe plead *Not guilty*. *Sid.* 22. Not guilty.

If the ſheriff demur *al narr'*, the action is againſt him.

But if the ſheriff demurs to the declaration, then the action is againſt him: for *the declaration ſhall be taken to be true upon the demurrer.* For the ſtatute is private, and the court will not take notice of it unleſs it be pleaded. But if the defendant had pleaded this ſpecially, or if he had pleaded *Non culp'*, he might have had advantage of the ſtatute, and outſed the plaintiff of his action. *Cro. El.* 624. *Sid.* 43[illegible] *Mod. Rep.* 244. *Cro. El.* 460.

Cepi Corpus

Amercement.

By theſe words in the ſtatute, *that if the ſheriff return a* Cepi corpus, *he ſhall be chargeable to have the body at the day of the return, &c.* it is intended only that he may be amerced to the king for not having the body at the day. 2 *Saund.* 60.

For not taking reaſonable ſureties.

An action on the caſe againſt the ſheriff for not taking reaſonable ſureties, not having ſufficient eſtates in the ſaid county, and returning *Cepi corpus*, and yet not having the bodies ready by the day lies not; for he is compellable to let to bail, and if he have not the body he ſhall be amerced; and because he ſhall be amerced, the ſtatute gives him a device to take ſufficient ſureties for his own indemnity. 2 *Saund.* 59.

Sheriff pleads, he had taken ſufficient bail, he need not ſay where, nor traverſe the intent.

In action on the caſe for taking inſufficient bail, the defendant pleads, he had taken ſufficient ſecurity. He need not ſay where, nor need he traverſe the intent to deceive the plaintiff of his debt: for it is not iſſuable at what place the ſecurity was given, and therefore need not be ſhewed, and the intent is not traverſable; and had the defendant pleaded it, it had been ill. *Sid.* 96.

How the ſheriff is to plead on 23 *Hen.* 6. *c.* 10.

Action on the caſe againſt a ſheriff for taking ſufficient bail. The defendant pleads the ſtatute 23 *H.* 6. *c.* 10. The plaintiff demurs to the bail, becauſe the ſheriff had not alledged, that he had diſmiſſed on bail (whom he had taken) by ſufficient mainpernors, but only alledged this by way of replication, and not poſitively. 2 *Saund.* 58. He is liable to an action for taking inſufficient bail as well as to amercements. *R. Raym.* 425. *Salk.*

Where the bail-bond ſhall be diſcharged, paying the amerciaments, and where not.

In debt on ſheriff's bond, the principal in [illegible] may be admitted to plead, diſcharging the amer[illegible]

ents, (and this is the courſe of the court) where e proſecution is freſh: but where the defendant in e original action, *viz.* the principal is become in- vent; *by court*, the bail-bond is the only remedy, d they will not diſcharge that on ordinary rules. this caſe *North* prayed the continuance of proceſs the bail-bond, in regard ſince the default of the earance of the principal, he is become inſolvent ſuffering ſeveral judgments. But *Jones* ſaid, t the bail appeared on the very day of the return, the default is the plaintiff's own, and the bond above a year old. And *by court*, Paying the erciaments and coſts, the bail were diſcharged, the principal admitted to plead. 2 *Keb. Rep.* 5. *pl.* 14. *Id.* 553. *pl.* 38.

Bail-bond ſued by the ſurety who paid the debt, &c.

The ſurety paid the debt, and he ſued the bail- d aſſigned by the ſheriff; on which a writ being cted to the coroners, they took a new bond and ned it, and they prayed the money out of the oners hands for the ſurety. *By court*, The co- er cannot diſcharge his bail-bond no more than ſheriff, and they ordered the principal debt to be . 2 *Keb. Rep.* 287. *pl.* 61. *Id.* 400. *pl.* 3.

Diſcharged by payment before the return.

bail-bond was diſcharged upon motion, the ey being paid before the return of the writ, and mon appearance ordered.

Aſſignment of the bail-bond.

the defendant appears not to the ſheriff's bond rding to the condition thereof, the plaintiff may the leave of the ſheriff) ſue the bond in the ſhe- name; but it is at the plaintiff's election to the ſheriff: and the ſheriff ſhall be amerced till ſign the obligation to the plaintiff. *Sid.* 24. *Abr.* 206.

Of aſſignment of bail bond by ſheriff.

ſignment of bail-bonds to the plaintiff, no new . A common practice before the ſtatute 4 *An.* and though in ſtrictneſs of law, a bond being *ſe in action*, ſuch aſſignments were not good, uch aſſignments have been taken notice of in s of law, and not ſuffered to be evaded.

Of the act about the aſſignment of bail-bonds by the ſheriffs.

is act not in nature of an authority to the ſhe- but a judgment in parliament, that the ſheriff do it, and he is liable to an action if he do

not; and in *Chancery* may be compelled to a ſpecifick performance, according to this act of parliament.

Two reaſons for making this act of parliament; the one to obviate the abuſive practice of ſheriffs, in releaſing theſe bonds; and thereby cutting off the plaintiffs from the advantage of them, for whoſe ſecurity alone they were taken. The ſecond reaſon was to remove the chicane of the law, that their bonds were not aſſignable, becauſe *Choſes in action*.

Had the *ſtatute* only made the bail-bonds aſſignable, and not ſaid by whom, the law would have ſaid, that the ſheriff was the perſon to aſſign it.

As to the objection that may be made, that the circumſtances, required by the act of parliament to be obſerved in aſſigning, make it neceſſary for the ſheriff to do it in perſon: it may be anſwered, that the reaſon of preſcribing theſe circumſtances, was only to make the aſſignment more effectual; and to diſtinguiſh the aſſignments by virtue of this act from thoſe in uſe before.

An aſſignment made after the year is not good.

The ſtatute enjoining the aſſignment to be under the hand and ſeal of the ſheriff, did make it a perſonal act.

Whether the ſheriff's executor may aſſign a bail-bond? or whether the plaintiff muſt ſue in the ſheriff's name?

If the ſheriff dies before aſſignment, his executor cannot do it. This is *caſus omiſſus*; and the plaintiff muſt ſue in the ſheriff's name, as at the Common law before this act. 10 *Mod.* 288.

Bail *de bene eſſe*.

When bail is put in *de bene eſſe*, (as bail taken in a chamber) the plaintiff cannot ſue the ſheriff's bond till it be refuſed or ſet aſide; but he ought to except againſt it in the judge's chamber. *Keb. Rep.* 6[illegible] *pl.* 5.

Where the ſheriff ſhall be compelled to aſſign his bail-bond.

The court cannot compel a ſheriff to aſſign a bail-bond regularly. But in ſome caſes they will, as where the party was arreſted by the ſheriff, and through his default in not returning the writ the defendant eſcapes. Now in this caſe, he ſhall not take advantage in his own wrong; but ſhall aſſign the bail-bond, or pay the utmoſt amerciaments. 2 *Keb. Rep.* 388. *pl.*

But now compellable.

" If any ſhall be arreſted by proceſs out of the urts at *Weſtminſter*, at the ſuit of a common per- n, and the ſheriff or officer taketh bail, the ſheriff the requeſt and coſts of the plaintiff, or his at- rney, ſhall aſſign the bail-bond to the plaintiff, indorſing the ſame, and atteſting it under his nd and ſeal in the preſence of (*a*) two witneſſes, ithout ſtamp, provided the aſſignment be ſtamped fore any action be brought thereon. And if the curity be forfeited, the plaintiff after aſſignment ay bring an action thereupon in his own name; d the court may by rule give ſuch relief to the intiff and defendant in the original action, and to bail, upon the ſecurity, as is agreeable to the ſtices, and ſuch rules of court ſhall have the na- re of a defeazance to ſuch bail-bond." Stat. 4 *An.* 16. *ſect.* 20.

Where proceedings upon bail-bonds ſhall not be ſtaid until ſpecial bail given.

It was moved in *K. B.* to ſtay proceedings upon il-bond, upon diſcharging the amerciaments and ſts (as is uſual). But it was alledged on the other e, that after the ſame bail given, the principal d *ſold his land*, and became *irreſponſible*, and ren- red himſelf to the *Marſhalſea*. And for this cauſe e court refuſed to ſtay proceedings, and ſaid it uld not be done until he had given ſpecial bail; cauſe they did not cauſe him to appear at firſt, cording to their obligation. And ſo it is, when e principal on ſuch default of appearance becomes bankrupt. *Sid.* 386. And it ſeems where the der-ſheriff delays executing a writ, *&c.* till the rty has aliened, *&c.* he himſelf ought to be an- erable.

Bail-bond aſſignable though defendant no arreſted.

An action was brought by the aſſignee of a bail- nd on the above ſtatute 4 & 5 *Ann. c.* 16. *ſ.* 20. d the defendant pleaded that the principal was not reſted by the perſon at the ſuit of the plaintiff by rtue of the *latitat*, as in the declaration men- ned; to which the plaintiff demurred; the de- ndant urged that there is a condition precedent in e above act, if the party be arreſted; but judg- ent for the plaintiff.

(*a*) See *Forteſc. Rep.* 371. here *P.*

Per Cur': The defendant firſt pleads the ſtatute of *H.* 6. and ſays by proteſtation, that this bond was taken *Colore officii* of the ſheriff, and then pleads the ſaid plea; the words are, if any one ſhall be arreſted by writ, bill or proceſs, and the ſheriff ſhall take bail from ſuch perſon againſt whom ſuch writ, bill or proceſs is taken out, the ſheriff ſhall aſſign; ſo the laſt words ſay only where a proceſs is taken out, and it would be odd to ſay no bail-bond ſhould be aſſigned but where the party is actually arreſted, though he ſhould appear without an arreſt. *Forteſc. Rep.* 364. *Stra.* 444. See *Id.* 643.

Sheriff may aſſign bail-bond after he is out of his office.

The plaintiff brings an action on an aſſignment of a bail-bond; the defendant pleads that at the time of the aſſignment they were not ſheriffs, but out of their office, and two others were ſheriffs at that time; the plaintiff demurs; judgment for the plaintiff; it was a good aſſignment, and a good deſcription of the party and ſheriffs. *Forteſc. Rep.* 364.

Bail-bond when and where it may be made.

Debt by an aſſignee of a bail-bond, the writ appeared to be returnable *Oct' Hil.* which was the 23d of *January*, and the bail-bond ſaid to be taken the 17th of *December* before the return of the writ; defendant pleads the ſtat. *H.* 6. and that the bail-bond was taken, *ff.* at a certain place, the 25th of *January*, after the return of the writ; *abſque hoc*, that the bond was made the 17th of *December* at *Weſtminſter*. The plaintiff demurs, and judgment *pro quer'*; *per Cur'*, The plea makes the place where the bond was made material, which the court held to be naught.

The court will take notice of its own practice.

And *per Cur'*: Though the bond was made two days after the return of the writ, yet it is good, becauſe the defendant has four days to put in bail by the practice of the court, which the court will take notice of. *Forteſc. Rep.* 365.

Stat. *H.* 6. &c. no good plea to action by aſſignee of a bail-bond.

An action was brought on an aſſignment of a bail-bond; the defendant pleads the ſtatute *H.* 6. and ſays it was a bond made for eaſe and favour, and ſo void; the plaintiff demurs.

Pa

Per Cur': It is no good plea, for, ſince the ſtatute the plaintiff ſets out the proceſs and the bond, and that the bond was to appear only at the return of the writ; and the defendant affirming it was a bond for eaſe and favour, ought to have traverſed the condition ſet out by the plaintiff; alſo here are two affirmatives only, which cannot make an iſſue; and where a condition of a bond is ſet out, *ad reſpond'* the plaintiff *de pli'to tranſgr. acetiam billæ pro* 200*l.* and does not ſay *billæ ipſius* plaintiff, yet it is well; for it cannot be a bill to be exhibited by any other. *Forteſc. Rep.* 365.

Action by aſſignee of bail-bond where to be brought.

Debt upon an aſſignment of a bail-bond was brought in *London*, and in the declaration it appears the bond was made in *Surry*, and that the aſſignment by the ſheriff of *Surry* was laid in *London*; it was held well, for the action was brought on the aſſignment. *Forteſc. Rep.* 366. 2 *Stra.* 727. Ld. *Raym.* 1455.

In ſuch caſe no need to name witneſſes.

Debt on aſſignment of bail-bond, if there be a *Profert* to the bond it is enough, and need not ſet down the names of the witneſſes. *Forteſc. Rep.* 366.

Action by aſſignee of bail-bond.

Debt upon an aſſignment of a bail-bond, and it appears upon the face of the declaration, that the writ was an *Acetiam* for 30*l.* and the bail-bond for 40*l.* ſo the bail was taken in a greater ſum than the debt, againſt ſtat. 12 *Geo.* 2. *c.* 29. [perpetuated by 21 *Geo.* 2. *c.* 23.] and there was a demurrer to the declaration. 2dly, It was excepted, firſt, that the plaintiff has not ſet out that the writ was indorſed; *Sed non allocatur*. 2dly, That the bail-bond being more than the ſum in the writ, makes the bond void.

Whether bail-bond may be for more than the ſum in the writ.

Per totam Curiam; If it were void, it ought to be pleaded, but this bond is not void; and the act only makes it a miſdemeanor in the officer, and the act is only directory, and the court of *Exchequer* was of the ſame opinion. *Forteſc. Rep.* 366.

What ſhall be ſaid to be a ge. bail-bond.

In debt upon an aſſignment of a bail-bond a general demurrer was to the declaration. The exception taken to it was, that the bail-bond was for

410 *l.* whereas the *Acetiam* was only for 400 *l.* now he obſerved that the ſtat. 12 *Geo. c.* 29. requires, that bail ſhould be given to the ſheriff for no more than the debt ſworn to, and that appears by the *Acetiam*; and this is a general law, he thought the exception might be well taken in this way. But ſaid on the other ſide, that he had known complaints to the court of *Common Pleas* of officers taking more bail than the ſum ſworn to, and they would not make any rules upon them, where the bail-bond was pretty reaſonable. The court ſaid, that they thought here were two queſtions of conſiderable difficulty; one whether the ſtatute intended to reſtrain the ſum contained in the penalty of the bond to the ſum ſworn to; or whether the legiſlature conſidered bail according to the legal ſignification of the word, and ſo to reſtrain the ſheriff only from taking double the ſum ſworn to, as a ſecurity for the debt? The other queſtion was, admitting the act of the ſheriff to have been illegal, whether the bond ſhould be conſidered as void, or the ſheriff only puniſhable for taking it? To the firſt of the queſtions the court ſeemed to be in a good deal of doubt; but at laſt judge *Reynolds* ſaid, that bonds to the ſheriff are not given as a ſecurity for the debt, but only for the party's appearance; and therefore he could not ſee much reaſon there was for the ſtatute, conſidering the eſtimate of the penalty of the bond to be according to double the ſum; but he thought the proper regulation of it was according to the very ſum ſworn to. And he ſaid, that before this ſtatute, he believed, it was a very common thing for the ſheriff to take little more than the ſum contained in the *Acetiam*. However, as to the other queſtion, the chief juſtice as well as judge *Reynold* ſeemed to think it would be hard to avoid the bond upon this account. *Barnard. K. B.* 181.

Mr. *Fazakerly* ſaid, that he did not know, whether it would be neceſſary for him to endeavour to ſhew, that the bond was void; becauſe the preſent action was not brought by the ſheriff, but by the plaintiff in the original action. Now he obſerved, that

that the plaintiff in the original action could not intitle himself to this, but by bringing himself within the terms of the stat. 4 *An. c.* 16. *s.* 20. This stat. indeed does allow of the assignment of bail-bonds; but then it must be understood only of such as are lawfully taken; and therefore if any bond was given contrary to the statute of *Hen.* 6. this statute has always been construed not to extend to it. Now the statute of 12 *Geo. c.* 29. which the present question is upon, has only added some other restrictions to these bonds besides those required of them before. And therefore he said, that it is equally necessary, that a bail-bond should be made in pursuance of this statute, to bring it within the intent of the stat. 4 *An. c.* 16. *s.* 20. and that it should be made in pursuance of the first statute. But that the present bond was not within the meaning of the last statute, he said, was plain, because the words of it are, that such bonds shall be for the sum sworn to be due and no more. And he observed that these bonds were always given as a security for the appearance of the party, and not as a security for the debt, and therefore there was no colour that such bond should be taken in double the sum; and consequently the words (for the sum) must be understood the same as if they had been (in the sum). This argument was sufficient to determine the present question; however to make it more clear, he offered a reason to shew that the case would have been the same, if the action had been brought by the sheriff himself; because he had no authority to take bail at all in these cases at Common law, and the bonds he does take are only by the authority of parliament. Now, he said, where these bonds are not within these statutes, they must be considered as unlawful bonds; and then this case must fall under a general principle of the Common law, that securities taken unlawfully by any officer under colour of legal authority are void in themselves, (they being considered as taken by extortion) and consequently when they appear so upon record the party may demur generally, and demand whether he shall be required

required to give an anſwer. To the firſt of theſe objections, it was ſaid, that the true deſign of this act of parliament, which the queſtion turns upon, was to prevent perſons being held to bail by the ſheriff in the ſum the action is brought for, which was the practice then; and it was provided therefore, that no perſon ſhould be held to bail in any greater ſum, than the plaintiff ſhould ſwear was his due. Now it was obſerved, that nothing could be a more natural conſtruction upon this act, than that as before the bail taken by the ſheriff was for double the ſum in the *Acetiam*; ſo now the bail taken by him ſhould be for double the ſum ſworn to; and this equally regulated the ſum as if it ſhould be exactly the ſame. To the ſecond objection it was ſaid, that there were caſes where acts were held to be illegal by ſtatute law as well as the Common law, and yet not allowed to be void, but puniſhable in a proper manner; and to this purpoſe was applied a caſe in 2 *Inſt.* 131. Judge *Page* ſaid, that he thought it unqueſtionable, that the bond was not aſſignable in the preſent caſe, if it did not clearly comply with the intent of this laſt act of parliament; but he thought it did for the reaſon juſt before mentioned, and compared it to the caſe of the *Acetiam*. The reſt of the court were of opinion, that the bond was not within the act, as the intent of bail-bonds is not to ſecure the debt, but the appearance of the party; and therefore whatever the practice might have been before of the ſheriff's taking double the ſum in the *Acetiam*, they thought that was not a regulation, which he was confined to by the law, but merely a voluntary one choſe by himſelf to be a guide to his diſcretion; for before, if the ſheriff had held the party to bail in any ſum, he was only puniſhable for his oppreſſion, but the bond could not be avoided. As this then is to be taken to be a bond not within the meaning of this laſt ſtatute, they thought it was not aſſignable, no more than a bond not regulated according to the reſtrictions of the firſt act. *Barnard. K. B.* 188.

Motion

Motion for the judgment of the court. They ſaid, that ſince this cauſe has been depending here, there have been actions of the ſame ſort, both in the *Common Pleas* and *Exchequer*, wherein this ſame point has come in queſtion; both of which courts have been of opinion, that bail-bonds may be taken in double the ſum contained in the *Acetiam*. All the court, except judge *Page* ſaid, that in their private opinion they were not ſatisfied with the reaſons of theſe reſolutions; however that there might be a uniformity in the judgments, they were willing to give judgment for the plaintiff; eſpecially too, becauſe when actions come here by original, the party will have opportunity of bringing a writ of error immediately in parliament; and then this queſtion may be finally ſettled at leſs expence. Accordingly that judgment was given. *Barnard. K. B.* 326.

An action was brought by the executor of an aſſignee of a bail-bond; it was objected the act ſays, the aſſignee ſhall bring an action. Judgment *pro quer'*; it is an intereſt veſted, which will go to the executor. *Forteſc. Rep.* 367. *Prac. Reg. C. P.* 68. By executor of aſſignee.

Here the ſtatute of *H.* 6. and ſtatute 12 *Geo.* 29. were pleaded, and judgment *pro quer'*; and here the indorſement of writ was ſet out, different from the *Acetiam*. *Forteſc. Rep.* 367. Action by aſſignee.

Debt by aſſignee of *William Morris*, bailiff of the liberty *Decani & Capital' Eccleſiæ Collegiat'* of *Weſtminſter*, inſtead of *Capituli Eccleſiæ*, *&c.* and judgment *pro quer'*. Objected, not ſaid aſſignment under hand and ſeal. Anſwer, it is ſaid in the declaration, the aſſignment was *Sigillat' & atteſtat'*; it was held well, becauſe in the very words of the ſtatute. *Forteſc. Rep.* 367. The like.

Nil debet pleaded to an aſſignment of a bail-bond; held not a good plea. *Forteſc. Rep.* 367. The like.

The proceſs was an action of trover *ad dam'* 100 *l.* and the condition of the bond was to appear *ad reſpond' de placito tranſgr' ſuper caſum ſuper aſſ' ad dam'* 100 *l.* this was urged to be a variance. What Bail-bond ſufficient.

But

But *per totam curiam*, (the ſtatute *H.* 6. being pleaded) there were only three things required ſo as to make the bond good, *i. e.* 1ſt, It muſt be by the name of office. 2dly, To appear at a proper Time. 3dly, At a proper place. The *ad reſpond'* is only ſurpluſage, and ſhall be rejected. *Forteſc. Rep.* 368.

What amounts to ſhewing a bail-bond taken by the name of office.

On error from the *Common Pleas* in actions of debt on bail-bonds, it was exception was taken that it was not ſhewn, that the bonds were to the ſheriff by the name of office, as the ſtatute 23 *H.* 6. *c.* 10. requires. And the court held, that it ſhould ſo appear; but they thought it did ſufficiently appear on the whole declaration, it being laid *ſolvend' eidem vicecomiti et aſſignatis.* Judgment affirmed. 2 *Stra.* 893.

This was a writ of error on a judgment in the *Common Pleas*, given there by default in an action brought by one as aſſignee of a bail-bond. The error aſſigned was, that there was a defect in the declaration, in as much as it appears to be a bail-bond, that was given to the ſheriff, and yet the bond itſelf does not appear to be given to him by the name of his office; for the obligation is only to *Edward Perſon* generally. And firſt it was ſaid, that it was not a clear point, whether this ſtatute of 23 *H.* 6. on which this bail-bond was given, was not a general law, which the court is bound to take notice of. And if ſo, he ſaid it was clear they might take advantage of this error, though they have not pleaded the ſtatute. But what was chiefly relied upon, was, that this action is founded upon ſtat. 4 *An. c.* 16. *ſ.* 20. which is a general ſtatute; and no action can be brought by an aſſignee of a bail-bond upon this ſtatute, unleſs the bail-bond is a good one; ſo that now by a mean the court is bound to take notice of the firſt ſtatute, to ſee whether this is a bail-bond, within that law, or not. To the firſt of theſe points, the court ſaid, it has been held, that the ſtatute of 23 *H.* 6. is a private law; and therefore if the ſecond does not help you, it is clear you cannot take advantage of it. Now

as to that, the court ſaid, that the words of the ſtatute for the amendment of the law are, that any plaintiff may take an aſſignment of a bond given to any ſheriff or other officer for his appearance; here the plaintiff has ſhewn himſelf to be ſuch aſſignee; and conſequently he may recover upon it. If indeed the words of this ſtatute had been, that any plaintiff might take an aſſignment of a bail-bond given to the ſheriff, the court ſeemed to think, that there might be a good deal in the objection. But as they were not, the court affirmed the judgment *niſi*. *Barnard. K. B.* 72.

In debt on bond for 18*l.* the defendant demanded *oyer* of the condition, ſet forth the ſtatute of *Hen.* 6. and farther pleaded, that a plaint was laid in the palace court in *Southwark* againſt one for 20*l.* that thereupon proceſs iſſued to a virger and miniſter of the court, who did arreſt the party, *apud Weſtmonaſter' infra juriſdiction' cur' prædict'*; and accordingly took the ſaid bond of her in the name of the plaintiff, for her appearance for eaſe and favour. The plaintiff replies, that the plaintiff was under marſhal and keeper of the priſon of the ſaid palace court, erected by letters patent in the reign of King *Charles* the Second, *vigore & ſecundum formam ſtatut' infra Weſtmonaſter' prædict'*; and that the bond was made to the plaintiff, *abſque hoc*, that the bond was taken in the name of the plaintiff, in the manner mentioned by the defendant. Upon this iſſue was joined, and a verdict found for the plaintiff. Motion in arreſt of judgment. The objection relied upon was, that the bond does not appear to have been given to the plaintiff in the name of his office. Agreed that the defendant did not demand *oyer*. But then the plaintiff ought to have ſet it forth in his replication; and prayed that the bond might be inrolled. To which purpoſe *Carth.* 301. *Lutw.* 680. were cited; it was likewiſe obſerved, that the plaint ſet forth in the plea is for a greater cauſe of action, than the ſum mentioned in the bond; and therefore the cauſes of action could not be intended to be the ſame. To this it was anſwered, that the palace court appears

by

by the record to have been erected long ſince the ſtatute of *Hen.* 6. and therefore that ſtatute could not extend to the caſe in queſtion. To this purpoſe was cited the opinion of the eleven judges againſt one in *Salk.* 373. that the ſtatute of 21 *Jac. c.* requiring informations to be brought in the proper county where the offence ariſes, does not extend to offences, for which informations lie by ſubſequent acts of parliament. Beſides, the bond on which the preſent action was brought, does not appear to have been a bail-bond; and if ſo, there was no colour for either of theſe exceptions. Now as to that, wherever a defendant may plead, that the bond was taken by *dureſs*, the bond ſhould not be conſidered, as taken by virtue of the ſtatute. And that wherever it did not appear, that the bond was taken within the officer's juriſdiction, ſuch bond may be pleaded to have been taken by *dureſs*. For this purpoſe were cited *Cro.* 745. *Cro.* — 309. *Dy.* 120. Now in the preſent caſe the bond did not appear to have been taken within the juriſdiction of the court. Agreed that the defendant had alledged in his plea, that bond was taken at *Weſtminſter* within the juriſdiction of the court. But that fact is found againſt defendant by the verdict. And nothing of this is admitted in the plaintiff's replication. It is only admitted there, that the bond was given *infra Weſtmonaſter' prædict'*. But one part of *Weſtminſter* may be within the juriſdiction, and one part out of it. And for this purpoſe was cited the (*a*) caſe of *Darly* and *Reydock*. The Chief Juſtice ſaid, that he took it clear that the *Weſtmonaſter' prædict'* in the plaintiff's replication, and the *Weſtmonaſter' infra juriſdiction' cur'* alledged in the plea, muſt be underſtood to be the ſame place. 2 *Barnard. K. B.* 67. It muſt be agreed even by the other ſide, that the plaintiff might well declare upon the bond generally, without ſetting forth that it was given to him in the name of his office, and when the defendant would avoid this bond by the ſtatute of *Hen.* 6. plaintiff

(*a*) Here at large *P.*

might

might well reply, that it was given to him in the name of his office; and this will be no departure. The queſtion therefore for the conſideration of the court is, whether the plaintiff by his replication has ſufficiently ſhewn, that this bond was given to him in the name of his office. He has averred, that it was given *vigore & ſecundum formam ſtatut'*; and that was a ſufficient averment after a verdict, that this bond was given to him in the name of his office. However, if this ſhould not be taken to be a ſufficient averment after a verdict; yet the plaintiff ought to have judgment; by reaſon that the iſſue is joined upon a collateral matter; and thereby the averment made unneceſſary. This latter part of the argument was inforced by two caſes out of *Lev.* 254. *Saund.* 156. where ſuch averment is not in the record; and yet the plaintiff had judgment. It was conceived that neither the want nor inſufficiency of ſuch an averment would be cured by a verdict, and 2 *Saund.* 177. was relied upon. Judge *Lee* ſaid, the difficulty with him was, what ſenſe ſhould be put upon the words *vigore & ſecundum formam ſtatut'*, he did agree, that if the ſenſe of it was, that the plaintiff took the bond exactly according to the preciſe terms and directions of the ſtatute, this would be good after a verdict, without ſhewing in particular, what thoſe directions were, that he followed. But, conſidering that the defendant had pleaded that this bond was taken in the plaintiff's name, he took the ſenſe of that clauſe to be nothing more, than that the plaintiff took this bond under the ſtatute, *abſq' hoc*, that *Birley* took it. For which reaſon, he thought that the plaintiff had intirely omitted ſhewing, that he purſued the directions of the ſtatute in taking the bond; which he took to be neceſſary for the plaintiff to have done, as the caſe comes out upon the defendant's plea, in order to maintain his action. To this purpoſe he put the caſe of a man's declaring in a general manner in debt upon bond, as the plaintiff has done here, and the defendant's pleading the ſtatute of *H.* 6. as he has done here likewiſe; ſuppoſe, he ſaid, the defendant's plea is ill

in ſome point of form, and the plaintiff demurs ſpecially. He took it in that caſe, it has been held, that the plaintiff in his replication muſt ſet forth, that the bond was given to him in the name of his office, otherwiſe the demurrer will be bad. For which reaſon he thought the judgment ought to be arreſted. However, the reſt of the court was of a different opinion, and ſaid, they thought the words *Secundum formam ſtatut'* would after a verdict imply, that the bond was given according to the directions and form of the ſtatute; though judge *Probyn* agreed, if the words had been *vigore ſtatut'* only, it would have been otherwiſe. Accordingly judgment was given for the plaintiff. 2 *Barnard K. B.* 199.

Aſſignment to uſe of plaintiff.

Caſe on an aſſignment of a bail-bond, and it was ſet out in the declaration that the bond was aſſigned to the uſe of the plaintiff, whereas the act is, ſhall be aſſigned to plaintiff.

But *per Cur'*, It is all one, and held well. *Forteſc. Rep.* 369.

Action by adminiſtratrix aſſignee of bail-bond.

The plaintiff brought debt upon an aſſignment of the ſheriff to her, ſhe ſuing in the original action as adminiſtratrix for a debt of 20*l.* and there was a demurrer generally to the declaration. It was objected for the defendant, that this was an aſſignment to her in her own right, and ſhe muſt ſue in her own name, and not as adminiſtratrix, *ergo* it is wrong; becauſe the action is brought in the *detinet*, and not in the *debet* and *detinet*. 2dly, It is not ſaid to be a bail-bond, only ſaid that bond was given to ſheriff to appear, *&c.* and it has no date, and the bond is in the penalty of 24*l.* and the writ but 20*l.*

Yet *per Cur'*, Judgment *pro quer'*, for it muſt purſue the nature of the original action, becauſe it will be aſſets, and is not ſhewn for cauſe that it was in the *detinet* only, and a bond is good without a date, and as to the ſum in the bond above the *Acetiam*, that makes not the bond void. *Forteſc. Rep.* 370.

Bond good without a date.

Action by aſſignee.

Objected, here is no breach aſſigned, becauſe it is averred only that the money was not paid to the plaintiff; but it is not averred, that the money in the bond was not paid to the ſheriff.

But

But *per totam Curiam*, It is well enough; for, he ſheriff had aſſigned it over, ſo the judgment of *K. B.* was affirmed. *Forteſc. Rep.* 371.

In the declaration the aſſignment of the bail-bond was ſet out to be atteſted in the preſence of one witneſs, naming him, *John Weaver*; on *Nil debet* pleaded, and demurrer, it was held wrong; it ſhould be in preſence of two witneſſes by ſtatute; on this the plaintiff did diſcontinue. *Forteſc. Rep.* 371.

Two witneſſes neceſſary to aſſignment of bail-bond.

A ſpecial original was taken out returnable *coram domino rege ubicunque tunc fuerit in Angliâ*, and the bail-bond was without the words *ubicunque, &c.* and on an action upon it, it was objected, that by the ſtatute of *Hen.* 6. (which was pleaded) the ſheriff could take no bond, but ſuch as was to appear at the place in the writ mentioned; whereas this might fail to compel an appearance out of *England*, if the king ſhould happen ſo to be. *Sed per Curiam*, where are no ſet forms of words for theſe bonds, but if in ſubſtance they are to appear according to the deſign of the writ, it is ſufficient. 2 *Cro.* 286. 1 *Vent.* 237. 2 *Show.* 51. 2 *Lev.* 180. *Trin.* 1 *Geo.* 2. in *Scaccario*, upon a *Quo minus*, the bond was to appear in the office of pleas in the court of Exchequer at *Weſtminſter*, and that was held well enough, though the proceſs was to appear before the barons; we will underſtand, that by appearing before the king is meant *before the king in his court*, and not before the king in perſon; the plaintiff muſt have judgment. 2 *Stra.* 1155. See *Id.* 153.

Bail bonds need not purſue the words of the return of proceſs.

In an action brought by the plaintiff as aſſignee of a bail-bond, the defendant pleaded a frivolous plea; and upon that there was a demurrer. Exception to the declaration, that the plaintiff had not ſet forth the time, when the bill of *Middleſex*, upon which the bail-bond was given upon, was taken out; and he ſaid, theſe writs have no (*a*) *teſte*, and

What ſhall be a good declaration in actions upon a bail-bond.

(*a*) A bill of *Middleſex* has only a return, no *Teſte*; the reaſon given why it has no *Teſte*, is, becauſe it ſuppoſes a plaint entered. 2 *Sid.* 129. 2 Ld. *Raym.*

therefore the time it was ſued out is neceſſary to be ſet forth, for by that it would appear, what time there was for the return; and if there was a term (*a*) intervening, the writ was a void writ; and of conſequence the bail-bond taken without authority: the court ſaid, that the defendant has pleaded *good bene & verum eſt*, he was arreſted by this writ, which ſhews, that the writ was not void; for if it was, he could not have been arreſted by it. Beſides, they ſay, if there was ſuch a fault in the writ, the defendant ought to have ſhewn it in his plea. Accordingly judgment was given for the plaintiff. *Barnard. K. B.* 347.

What ſhall not be ſaid to be a good declaration in an action upon a bail-bond.

In debt upon a bail-bond the plaintiff declares that a proceſs iſſued out of the palace court, and that by virtue of it the defendant was arreſted in *Weſt'*; upon which the defendant gave this bond for his deliverance. The defendant pleads the ſtatute of 23 *Hen.* 6. and ſhews many particulars in which the bond is void by virtue of it. Upon this the plaintiff demurs generally. Exception to the declaration, that *Weſt'* does not appear to be within the juriſdiction of the palace court, and of conſequence this bond cannot be taken to be upon that ſtatute, but at Common law; and therefore the plea was not good. To ſupport this exception he cited *Dy.* 120. *Lutw.* 680. The court ſeemed to think there was a good deal of weight in it; and therefore gave judgment for the defendant unleſs cauſe the ſecond day of the next term. *Cro.* 309. *Barnard. K. B.* 336.

When a perſon is taken upon an attachment out of the court of *Chancery*, and a bail-bond is given upon it, how far ſuch bail-bond ſhall be ſaid to be good or not.

In an action upon a bail-bond the defendant prays *Oyer* of the bond and condition; then by his plea ſet forth the ſtatute of 23 *Hen.* 6. and averred, that

(*a*) A writ may be ſued out on the firſt day of *Trinity* term, and made returnable the laſt return of *Michaelmas* term; but it cannot be ſued out in *Michaelmas* term, and made returnable in *Eaſter* term, becauſe then all the term will intervene, which is irregular, and the cauſe out of court. *Salk.* 273. 2 *Bac. Abr.* 234. 2 *Rol.* 442, 443, 444. *Cro. Eliz.* 467. *pl.* 17. 2 *Ld. Raym.* 775. 19 *Vin. Abr.* 225. *pl.* 3. and notes.

the bond was given by him for eaſe and favour of one *Joſhua Draper*, or to be diſcharged from his impriſonment. The plaintiffs by their replication ſet forth, that an attachment iſſued out of *Chancery* againſt one *Joſhua Draper* in a certain ſuit there at the inſtance of a private perſon, that thereupon the ſaid *Joſhua Draper* was arreſted, and for his deliverance the preſent bond was given, *abſque hoc*, that it was given for eaſe and favour of the ſaid *Joſhua Draper*, or to be diſcharged from his impriſonment. To this replication there was a demurrer, and the cauſes ſpecially ſhewn, that the traverſe contains matter uncertain and untraverſable, and that the plaintiffs have not ſufficiently averred their traverſe. Argument in ſupport of the demurrer; that though the concluſion of the defendant's plea was in the words of the plaintiffs traverſe; yet it contained in it double matter, and was uncertain; and therefore the iſſue ought to have been joined in ſuch a manner as that the traverſe ſhould have been of ſuch matter only, as ſhould have made it ſingle, and likewiſe certain. That the traverſe was not ſufficiently averred; for it is in the ſingular number *& hoc paratus eſt verificare*, whereas it ought to have been in the plural, by reaſon that there were two perſons joint plaintiffs; ſo for the ſame reaſon the beginning of the replication was bad likewiſe, for it is *ab actione ſuâ praecludi non debet*. For which purpoſe was cited 2 *Lutw.* 1529. and the caſe of the *Queen* and *Ingram*, *Trinity* 11 *An.* There two were indicted for an aſſault and battery; in arreſt of judgment it was moved, that the indictment was uncertain, it being *inſultum fecit & verberaver'*. The court held they could give judgment for the battery, by reaſon of the word *verberaver'*; but Lord *Macclesfield* agreed it was bad for the aſſault. He obſerved farther the bond ſet out upon the *Oyer* varied from that ſet out in the declaration; for in the declaration it is alledged, that the defendant was bound by the name of *George Stevens*, *Mercator in Holborn in Com' Mid'*; whereas upon the *Oyer*, the words in *Com' Mid'* are omitted. But beſides theſe

exceptions, which went to the form only of the proceedings, the bond was void, as being againſt the ſtatute of 23 *H.* 6. for as he apprehended, no ſuch bond could be taken upon an attachment; and for this purpoſe cited 3 *Leon.* 208. 2 *Ander.* 122. and the caſe of *Beel* v. *Watford*, *Mich.* 4 *Geo.* in the court of *Common Pleas*. There *Mugg* was taken upon an attachment, wherein was the very ſame form of words as in the preſent one, *to anſwer ſuch matter as ſhould be objected againſt him*; a bail-bond given upon that, and the court held it to be void; cited *Dy.* 364. *Salk.* 608. to ſhew that the bond was legal. And judge *Page* ſaid he remembered in the *Exchequer* a man was held to be bailable upon it. However, as this cauſe was too ſpecial for the laſt paper day, it ſtood over. 2 *Barnard. K. B.* 268.

Though the bail taken by the ſheriff be ever ſo good, yet the *plaintiff may refuſe an aſſignment* of it, *and proceed againſt the ſheriff by Amercements*; therefore it behoves him to take good bail. It is true, the ſheriff ſhall not be brought in contempt for not bringing in the body, but the only way is to amerce him, and ſheriff may proceed on the bail-bond; and the *plaintiff* by 23 *H.* 6. *c.* 10. *has election* of bail or amercement; *by Court* 12 *Mod.* 447. Lord *Raym.* 723. *Bac. Abr.* 206.

The way upon taking aſſignment of bail-bond is to *indorſe a promiſe* upon it, *to ſave the ſheriff harmleſs againſt amercements*, and yet the bond continues ſtill in the ſheriff's cuſtody. 12 *Mod.* 516.

The *ſheriff* upon aſſignment does *not part with* the poſſeſſion of *the bond*, becauſe if the plaintiff be nonſuited the ſheriff muſt be indemnified; but he *muſt produce it at the trial*; by *Holt* Ch. J. 12 *Mod.* 527.

Debt upon a bail-bond as aſſignee of the ſheriff of *Suſſex*, according to ſtat. 4 *Ann. c.* 16. *ſ.* 20. and *declared generally without ſhewing* matter ſpecially, *that it was a ſheriff's bond*, which by ſaid act is aſſignable; to which there was *a demurrer*; *by Court* it ſhould have been ſhewn that it was a bond aſſignable; and when Mr. *Salkeld* found the opinion of the

the court againſt him, he prayed to diſcontinue, which was granted on payment of coſts. 11 *Mod.* 170. *pl.* 7.

Holt Chief Juſtice ſaid, that upon an action by an aſſignee of a ſheriff's bond, it is enough to *ſet forth*, that the bond was *Pro comparentia* of the defendant, and there is no need of ſetting out the *matter at large*. 11 *Mod.* 237.

Holt Chief Juſtice made it a rule of court, and ordered it to be ſcreen'd up in the office, that *no bail-bond* ſhall be *aſſigned in town till four days after the writ*, and *not till* ſix days *after the return in a country cauſe*. 11 *Mod.* 253. *pl.* 4.

In debt by aſſignee of a bail-bond; it was objected to the declaration on a demurrer, that the breach of the condition *was ſet forth to* be, *his not appearing ſecundum exigentiam brevis*, *nor* ſet forth *on what day the writ was returnable*, and then *Non conſtat*, whether he did appear or not *ſecundum exigentiam brevis*, and ſo whether the bond was forfeited or not; and *Parker* Chief Juſtice held the not ſetting forth the return of the writ to be a fatal objection; adjourned. 10 *Mod.* 190, 191.

Under-ſheriff and clerk cannot aſſign a bail-bond.

H. *a high-ſheriff did*, by a legal inſtrument, *make* L. *his under-ſheriff in truſt for* A. who had been under-ſheriff the year before; *neither* L. *nor* A. *took the oaths required by* 27 El. c. 12. *After* H.'s *year was expired, and before a new ſheriff was appointed*, A. *makes an aſſignment of a bail-bond*; and the queſtion was, whether *A.* was ſuch a perſon, as that his aſſignment of the bail-bond was a good aſſignment within the ſtatute 4 *An.* c. 16. *ſ.* 20. (N. B. *A.* always acted as under-ſheriff, and *L.* not at all.) 10 *Mod.* 288.

Parker C. J. ſaid, he had the advice of all his brothers, and they were of opinion, that an under-ſheriff himſelf might aſſign a bail-bond in the name of the high-ſheriff, it having been the conſtant practice ever ſince the ſtatute 4 *Ann.* but that if the aſſignment was neither by the high-ſheriff nor his under-ſheriff, it would not be good; and that being

ing the preſent caſe, the defendant had judgment. *Stra.* 60.

An action of debt was brought upon an aſſignment of a bail-bond taken by the ſheriff, who had arreſted the defendant upon a *Capias*, *&c.* and upon a demurrer to the declaration it was objected, that the plaintiff had *not ſet forth the Capias, or the Teſte, or return of any Capias*, as he ought to have done, and the court of *C. B.* being of that opinion, a writ of error was brought in *K B.* but the judgment of *C. B.* was affirmed; for it is the *Capias* which gives life to the bond. 8 *Mod.* 78.

Aſſignees of a bail-bond by the ſheriff *brought debt, and had judgment by Nil dicit*, whereupon error was brought, becauſe it was not ſhewn that the ſheriff *aſſigned the bond to them by indorſing the ſame, and atteſting it under his hand and ſeal in the preſence of two or more credible witneſſes*, as the ſtatute 4 *Ann. c.* 16. *par.* 20. directs, but only alledges *that the ſheriff at the coſts of the plaintiff in the ſuit, according to the form of the ſtatute in that caſe lately made* and provided, *did aſſign* to the plaintiffs the ſaid bond; but the court unanimouſly over-ruled the exceptions; "All defects (which would have been aided by verdict) being aided after judgment by *Nil dicit*, by the ſame act of 4 *Ann.*" And it being expreſly alledged that the bond was aſſigned *ſecundum formam ſtatuti*; and judgment was affirmed. 2 Ld. *Raym. Rep.* 1564.

Felony. The ſheriff cannot bail one committed for felony, except it be by the king's ſpecial writ directed to him for that purpoſe.

Indicted. A man indicted for treſpaſs, or any the like offence, before juſtices of the peace, and thereupon committed to priſon, may upon the king's writ be bailed by the ſheriff to appear at ſeſſions.

Superſedeas. Upon a *Superſedeas* the ſheriff may bail a man ſued or indicted, *&c.* whereupon a *Capias* or *Exigent* ſhall be awarded againſt him, and the party thereupon impriſoned.

Attachment. He may take bail upon an attachment, *pro pace*, by the expreſs words of the writ.

If

If he take inſufficient bail for an appearance, and the plaintiff refuſes it, he is liable to an action, and alſo to be amerced. *Salk.* 99. Ld. *Raym.* 425.

But in either caſe, if the plaintiff take an aſſignment of the bail-bond (though the bail be inſufficient) the ſheriff is not to be amerced. *Salk.* 99. Amerced. 12 *Mod.* 447, 527.

The ſheriff cannot take bail on an attachment for a contempt, becauſe it is in nature of an execution. *Com. Rep.* 264. *pl.* 145. *Barnes's* Notes *C. P.* 53. *Caſ. of Pract. C. P.* 14, 100. 5 *Vin. Abr.* 450. *pl.* 29. 3 *Leon.* 208. *Dy.* 264. 2 *Vent.* 237. *Gilb. Eq. Rep.* 84. unleſs at a judge's chambers. *Stra.* 479. Ld. *Raym.* 723. See 12 *Mod.* 557.

The defendant being ſheriff, and having taken up a man upon an attachment, took a bail-bond from a ſufficient bail for his appearance. It was moved by *Raymond*, that the *proſecutor* ſhould be *compelled to take an aſſignment* of the bail-bond; and this he ſaid was frequently granted in the *Common Pleas*, where obligee was a ſufficient perſon; but the court denied the motion. 12 *Mod.* 579.

The plaintiff may either accept an aſſignment, or proceed againſt the ſheriff by amercements, and the ſheriff may reimburſe himſelf by ſuing the bail-bond, but if the bond is not ſufficient he is without remedy. 2 *Salk.* 608. *pl.* 1. Ld. *Raym. Rep.* 722. 12 *Mod.* 579.

See *Chap.* 4. *Arreſt.* Title by reaſon of the cauſe of action.

CHAP. VII.

Return of Writs.

Return, what.

A Return is but a certificate made by the ſheriff or bailiff to the court, from whence the writ iſſued, of that which they have done touching the execution of the ſame writs. *Dalt. Sher.* 662. See 2 *Lil. Abr.* 583.

On the *Eſſoin day.*

A return may be on the *Eſſoin day.* A writ ſhall not abate if the return be *Quarto die poſt.*

Appearance.

If a man be bound to appear the firſt day in term in court, he may appear the firſt day of the *Eſſoin*, and then have his appearance recorded, and this is good. 2 *Bulſt.*

Where it is neceſſary to return a *Fieri fac.* and where not.

If on a *Fieri facias* all the money is not levied, the writ muſt be returned before a ſecond execution can be taken out, for that muſt be grounded upon the firſt writ, and recite that all the money was not levied upon the firſt; but if upon the firſt all the money had been levied, the writ need not have been returned, for no farther proceſs was neceſſary. *Salk.* 318. *pl.* 1.

When a *Scire facias* is taken out againſt bail, how long it ſhould lie in the office. *T. Jo.* 228.

Upon the irregularity of a *Scire facias* againſt bail being referred to the maſter, he reported, that a *Scire facias* was returned upon it; but that it did not lie in the office four days before the return. And whether this was requiſite or not, was the queſtion. Argued, that it was not, and (*a*) 2 *Salk.* 599. re-

(*a*) A *Capias ad ſatisfaciendum* againſt the principal, in order to charge, the bail muſt lie four days excluſive in the ſheriffs office, but there is no ſet time for a *Scire facias*: ſame rule laid down *Mich.* 10 *W.* 3. *B. R.* but a *Scire facias* againſt bail muſt lie a convenient time, and the firſt *Scire facias* may be antedated even in term time, *per Clarke* ſecondary. *Sed per Holt* Chief Juſtice, It cannot be antedated where it iſſues by rule of court. 2 *Salk.* 599.

lied

lied on. However, the other ſide ſaid, they had two caſes directly with them later than this in *Salk.* One was that of *Olgar* and *Staples*, *Trin.* 1724. the other that of *Gilbert* and *Billingſley.* The maſter ſaid too, that in the book of practice left him by his father, there is no diſtinction between two *Nihils* and a *Scire feci* in this reſpect; and conſtant experience is, that each of the *Scire facias's* muſt lie in the office four days, where two *Nihils* are returned. The court thought this the moſt reaſonable; but however ordered this matter to be farther inquired into. *Barnard. K. B.* 364.

Where the writ or proceſs is directed to the biſhop, there the biſhop is to make return thereof: and ſo where the writ is directed to other perſons (as coroners) they are to make returns. *Dalt. Sher.* 162, 537.

Deputies are allowed in miniſterial offices: but all returns made by them are to be made in the name of the principal officer. 3 *Bulſt.* 78.

The ſheriff muſt return true, and not contrary to the record; if he do, it falſifies all his proceedings. *L.* brought treſpaſs againſt *J. G.* widow; hanging the ſuit, ſhe takes *D.* to huſband; judgment was againſt *J. G.* and a writ was directed to the ſheriff, *quod aperet* J. *prædictam per nomen* J. G. *ad ſatisfaciend'*, &c. the ſheriff cannot now return that ſhe was married. *Cro. Jac.* 323. The defendant marries pending the ſuit.

The return muſt not be contrary to the former return. Return of jurors.
If the preceding ſheriff return upon the *Venire fac'* twelve jurors, the ſucceeding one upon the *Diſtringas* cannot return that one juror had nothing, for this is againſt his former return, 19 *H.* 6. 38. for if he had at firſt, and alien ſince, yet is chargeable with iſſues. But if the land be recovered by *Eign title* in the mean time, he may return it with this concluſion, *Et iſſint nihil habet. Id. ibidem.* So if he had land in the right of his wife, and ſhe is dead in the mean time.

The return of the *Nihil* was by a ſucceeding ſheriff, and by the whole court, he was amerced; for it muſt enſue the firſt return. For if any *juror* has Name of the ſheriff, ſee after.

eſtate

eſtate conditional, and the condition is performed, and the feoffor enters, or ſuch like; in theſe caſes the ſheriff ought to return the ſpecial matter, and conclude, and ſo *Nihil habet*, and if he was never ſufficient, he ſhall have *Action of deceit* againſt his predeceſſor. *Bro. Abr.* tit. *Retorn de briefs*, *pl.* 49. cites 19 *H.* 6. 38. But *Fort.* and *Markham* agreed, that *if the defendant be returned ſufficient, and after nihil*, this is well; for the party may have *Capias* and *Exigent* againſt him; *contra* againſt the juror. *Bro. Abr.* tit. *Retorn de briefs*, *pl.* 49. cites 19 *H.* 6. 38. *Id.* Tit. *Action ſur le caſe*, *pl.* 53. cites *S. C.*

"For returns delivered to ſheriffs by bailiffs of franchiſes, an indenture ſhall be made between the bailiff of the franchiſe and the ſheriff by his proper name; and if the ſheriff change the return ſo delivered to him by indenture, and be thereof convict at the ſuit of the lord, or of the party that hath ſuſtained loſs, he ſhall be puniſhed by the king for his falſe return, and ſhall yield unto the lord and to the party double damages; alſo ſheriffs and other bailiffs that receive the king's writs ſhall ſend their own name with the returns, ſo that the court may know of whom they took ſuch returns, and if any ſheriff or other bailiff leave out his name in his returns, he ſhall be grievouſly amerced." Stat. 12 *Ed.* 2. *c.* 5.

This ſtatute wills expreſly, that the ſheriff ſhall put his name to the returns; ſo that it ſeems it was otherwiſe before. *Bro. Abr.* tit. *Retorn de briefs*, *pl.* 81. cites 41 *Aſſ.* 29. Exception was taken that *no name was put to the certiorari returned out of the treaſury into the chancery*, and *non allocatur*; for *no miniſter ſhall put his name by the Common law*, but *by the ſtatute the ſheriff ſhall put his name* to his returns, and does not ſpeak of any other officer; *nota Bro. Abr.* tit. *Retorn de brief*, *pl.* 48. cites 8 *H.* 6. 27.

If a *Mittimus be returned with fine in K. B. by the treaſurer and barons of the exchequer*; this is well, though they *do not put their names to it*; contrary of the ſheriff by the ſtatute. *Bro. Abr.* tit. *Retorn de brief*, *pl.* 129. cites 11 *H.* 6. 44.

In debt upon the *Exigent*, a writ of *proclamation* iſſued according to the ſtatute, and it *was returned ſerved, but the ſheriff had not put his name* to the return; and for this cauſe the outlawry was challenged. *Dyer*, *Brown*, and *Weſton* thought this was no cauſe to reverſe the outlawry, it appearing by the return that he was lawfully demanded; for the words are *Ad comitatum meum tentum*, and *proclamari feci*; ſo as it appears that he was made by the ſheriff, and *this ſtatute only impoſes a penalty upon the ſheriff*; if he puts not his name to the return of the writ, but that the want thereof is not error; but if upon the back of the writ nothing be writ nor returned, this will be error. *Welſh* and *Harpur e contra*. And that 26 *H.* 8. 3. an *Exigent* was returned ſerved, and the name of the ſheriff omitted in the return; and this held error. And the clerks ſaid that there were many precedents, where there turns for this cauſe were adjudged inſufficient. Whereupon *Dyer* ſaid, We will be adviſed of it. *Mo.* 65. *pl.* 176.

The name of the ſheriff was not to the *Diſtringas*, nor to the *Tales* awarded upon it, and it was tried by *Niſi prius*. It was inſiſted, that the ſheriff not putting his name does not make the return ill, and that it is helped by 32 *H.* 8. *c.* which helps inſufficient returns, and no writ returned; but court *contra*, for of neceſſity the name of the ſheriff is to be to the return, otherwiſe it appears not by what warrant it came in; and otherwiſe any man without the ſheriff might return writs, which would be a great inconvenience, and the ſtatute does aid only inſufficient returns, or when the writ cannot be found; ſo it may be intended it is imbeziled: but here it appears, and that it was never returned, wherefore it cannot be good. And it was ſaid it was ſo ruled in *C. B.* 35 *Eliz.* and alſo in *K. B.* and for this cauſe the judgment was ſtaid. *Cro. Eliz.* 10. *pl.* 20.

Diſtringas directed *to the coroners was returned* by them *with their names* ſubſcribed, *but leaving out the name of office*, viz. *Coronatores*, *&c.* and this was adjudged erroneous; but if they had not put their proper

per names, the return had been good, becauſe coroners and the chamberlain of *Cheſter are not within this ſtatute*, which requires ſheriffs to put their names to returns. The Common law required the name of office to be ſubſcribed, whether it was ſheriff, coroner, chamberlain, &c. ſo at this day the ſheriff is bound to put his ſurname and name of office, but other perſons only their name of office. *Mo.* 548. *pl.* 734. *Cro. El.* 703. *pl.* 23. and that the *Ven. fac.* was returned by them and their names, *viz. A.* and *B.* were writ, and alſo the word *Coronatores* added, which was omitted upon the *Habeas corpora*, on which was indorſed *A.* and *B.* only. It was moved not to be error, becauſe before this ſtatute the ſheriff need not have put his proper name nor name of office to his return, and this ſtatute extends only to the ſheriffs and bailiffs of franchiſes; for the coroners to this day are out of the ſtatute; and at the Common law it is well enough, for it was not uſual to put the ſheriff's name to returns; and for proof thereof divers precedents were ſhewn by *Agar* deputy chamberlain of the *Exchequer*, many of which were writs of aſſiſe; the one was in 5 *Ed.* 2. aſſiſe againſt the abbot of *Abbington*, and one *J. S.* his commoigne, and in none of the writs the ſheriff's proper name or office was returned. And upon theſe precedents ſhewn the court conceived it to be well enough, and no error; for when a writ is returned, it is intended to be by the very officer of the court who ought to do it, which is the reaſon, that at the Common law the ſheriff's name needed not to be put to any return; and this reaſon holds here. But they all held, that if their names ought to have been here, then it is not aided by the ſtatutes 32 *H.* 8. c. nor 18 *Eliz. c.* 5. And they held, that the ſtatute of 12 *Ed.* 2. *c.* did not extend to coroners; but they would adviſe.

Venire facias was returned thus: *viz. Per Thomam Ravenſcroft vicecomitem, iſtud breve cum Panella annexo mihi deliberatum fuit per Hanmer militem nuper vicecomitem, in exitu ab officio ſuo, & ſic inderſatum Tho. Hanmer nuper vicecomes.* It was objected, that it

it appears that it was returned by one who had no authority; for the saying (*nuper vic.*) excludes him from being sheriff, when he made the return. But three justices held, that the return was good enough; for he needs not alledge his name of office: and by the statute the adding his *name is sufficient, and that need be only his Christian and Sir-name*, and the addition of *nuper vicecomes* shall be intended that he returned it when he was sheriff, and made that addition when he delivered it to the new sheriff; and so shall not make the return void. But *Whitlock* justice seemed to doubt, for which reason the court would further advise. *Cro. Char.* 189. *pl.* 9. 570. *pl.* 7. 2 *Rol. Rep.* 219. [notwithstanding the difference of the years, *&c.*] But I do not observe that the court gave any opinion as to the *nuper vicecomitem*. *Palm.* 151. And *Dodderidge* Justice said, the subscribing his Christian and Sir-name, without saying *vicecomes*, is error; and *Mountague* held, that it ought to appear by the return that he was sheriff at the time; and thereupon they and *Haughton* agreed the return void, and not aided by the statute: but *Mountague* doubted if the return be erroneous upon the statute of *York*, because the Common law was, that a return without a name was good; and the *statute of York says, That the sheriff shall, &c. and if he doth not, then it inflicts a penalty upon him.* And so it seems that the return is not void, but only that the sheriff shall be punished. But all the other justices said, that the *Common law is changed by the first words*, viz. *The sheriff shall*, &c. and the penalty is *in terrorem* of the sheriff, and that the statute was always expounded so, and that the practice has been accordingly. *Rol. Rep.* 210. And *Chamberlain* J. said, that the judges of *C. P.* would cause the sheriff's name, before the judgment given, to be subscribed to the return, though it was omitted before at the time of the return. But the Reporter says, that 5 *Rep.* 41. is against this opinion of *Chamberlain*. *Palm.* 191. See 2 *Ld. Raym.* 886.

Returns must be made according to antient course, and according to precedents; as waste was assigned in *S.* the return

Returns according to antient course.

return muſt not be *quod acceſſit ad* S. but *ad locum vaſtatum.*

Error. So a return of *non inveni partem*, for *non eſt inventus*, is error, and not amendable. 9 *H.* 6. *fol.* 12.

Superdictus for *infra nominatus.* *Mercer* was outlawed at the ſuit of *H.* It was moved to avoid the outlawry, becauſe the ſheriff returned the exigent on the back of the writ, thus, (viz.) *ſuperdictus Mercer*, where it ought to be *infra nominatus Mercer*; for nothing was written above, but within. But by all the Juſtices the return was good. So if he had writ the return on the inner ſide of the writ. *Dalt.* 164.

Surpluſage. See after *Dalt.* 172. *Surpluſage is no hurt to the return* of a writ, as in *elegit*, and the ſheriff returns that to be executed; the extent of the church of St. *Andrews*, *alias dict' St. Edes*, and the true name is *Andrews*, yet good. *Winch* 27. In *ſcire fac'* returnable in *B.* If the ſheriff return *ſcire fac'*, &c. *qd' ſit coram vobis ad faciend', qd' breve requirit:* although *vobis* had relation to the King, where the garniſhment ought to be *coram juſticiariis*, yet good; for theſe words, *ad faciend' qd' breve requirit*, comprehend all. 29 *Ed.* 3. 33. Adjudged, *every return muſt exactly anſwer the writ.*

Statutes aid miſreturns and inſufficient returns, but not where there is not any return. Cro. Car. 587.

Officer. *None can make the return of a writ, but ſuch a perſon, who at the time of the return remains an officer to the court.*

The ſheriff's return cannot be falſified by affidavit. *Comb.* 255. Nor is his return of a reſcue traverſable. *Ibid.* 295. For againſt the return of the ſheriff there is not any traverſe, averment, or anſwer. But this ſeems intended only of returns of reſcues.

Feigned returns miſchievous. By *Maynard*, in *Mod. Rep.* 248. it is a great abuſe in officers to return feigned names; the firſt cauſe of which was the ignorance of the ſheriffs, who being to make returns, and looking into the precedent books for the form, and finding *John Doe* and *Richard Roe* put for examples, made their returns accordingly, and took no care for true ſummoners and true manucaptors; and cited the following caſe.

Judgment

Judgment was entered in *B.* in a plea of *quare impedit*, upon non-appearance to the grand diſtreſs; but there the party was ſummoned, and true ſummoners returned. Upon non-appearance an attachment iſſued, and real ſummoners returned upon that; but upon the diſtreſs it was returned, that the defendants *diſtricti fuere per bona & catalla, & manucapt'* J. Doe & R. Roe: and for that cauſe the judgment was vacated. Judgment vacated.

When the grand diſtreſs is awarded, it is that the ſheriff is commanded to ſeize the thing in queſtion. Grand diſtreſs.

If the defendant be taken, then at the return of the writ, the plaintiff's attorney, at the day of the return of the writ, may give a rule at the clerk of the rules for the ſheriff to return his writ; or if he go out of office, then a *diſtringas* to the new ſheriff to diſtrain the old ſheriff to return his writ: but if the defendant be arreſted by a bailiff of a liberty, who hath the execution and return of writs, then he muſt return his warrant back to the ſheriff by rule of court, or *diſtringas*, directed to the ſheriff to diſtrain the bailiff, and ſo amerce the bailiff that way. *Compl. Sher.* 148. Rule to the ſheriff to return his writ.

Motion for a rule on the under-ſheriff of the county of *Northampton*, to ſhew cauſe why he did not deliver to the plaintiff the money levied on a *ſcire facias*, upon an affidavit, that the defendant's goods being taken in execution, the under-ſheriff wrote a letter to the bailiff to deliver them up, becauſe he had received the debt and coſts; ſince which the money had often been demanded of the under-ſheriff, but he had not paid it. The court declared they ſhould willingly grant the motion, if it had ever been granted before, *Comb.* 25. for they have obſerved of late, that under-ſheriffs make it a practice to delay plaintiffs their ſuits, and to ſtand out till the attachment. However, they ſaid, they would think of ſome way to make under-ſheriffs pay coſts for their delay. The rule made at preſent was only, that the ſheriff ſhould return his writ. 2 *Barnard. K. B.* 33. When rule is made upon a ſheriff to return a writ, how far it ſhall be with coſts.

Motion for a peremptory rule upon a ſheriff to return a writ. The court ſaid, that there appeared ſo manifeſt an oppreſſion in ſheriffs, by their not executing the proceſs duly as it ought to be, that they had reſolved to grant theſe peremptory rules with coſts: accordingly they did ſo in the preſent caſe. 2 *Barnard. K. B.* 88.

When a rule is made on a ſheriff to bring in the body, what is the proper method to enforce a rule of that ſort.

The ſheriff had made a return of *Cepi corpus*, but would not bring in the body. Upon which the plaintiff had obtained ſeveral rules upon the ſheriff to bring in the body; but the ſheriff ſtill ſtood out in contempt; and therefore the plaintiff prayed now an attachment againſt him. But the court upon hearing the rules read ſaid, there was not one peremptory rule; and therefore the motion for an attachment was irregular at preſent. However upon a peremptory rule being then deſired, the court granted it. And in another caſe they ſaid that amercements only uſed to be the method of inforcing theſe rules, but lately they have granted attachments. *Barnard. K. B.* 246.

Rule for ſheriff to return writ diſcharged, defendant being protected by a public miniſter, and protection regiſtered.

Defendant was protected by baron *Hoffman*, a publick miniſter, and the protection was regiſtered in the ſheriff's office, according to the act of parliament. [7 *An. c. ſ.*] A *Capias ad reſpondend.* was delivered to the ſheriff of *Dorſetſhire*, who durſt not execute it, by reaſon of the protection, and the penalty in the act. Plaintiff ſerved the ſheriff with a treaſury rule to return the writ, which rule was diſcharged by the court. 2 *Barnes* 332.

Sheriff muſt return writ, tho' made to plaintiff's own bailiff.

Rule for *Ambroſe* late ſheriff of *Eſſex* to ſhew cauſe why he ſhould not return ſeveral writs of *Fi. fa.* and *Venditioni exponas.* Cauſe ſhewn, that all the warrants on theſe writs were granted to ſpecial bailiffs of plaintiff's nomination; and that indemnities to the ſheriff were indorſed on all the writs, and ſigned by plaintiff and his attorney. *Per Cur.* The rule muſt be abſolute. The indemnities are neceſſary, becauſe plaintiff may call for returns, though warrants were made to his own bailiffs. *Barnes* 302. See 2 *Barnes* 331.

Treaſury

Treaſury rule for the late ſheriff of *Devonſhire* to return a writ of *Capias ad reſpondendum* diſcharged. *Terry*, late under-ſheriff (as uſual in *Devonſhire*) had intruſted plaintiff's attorney with blank warrants, to be directed to bound bailiffs only; and he had filled up a warrant on this writ, and directed and delivered it to a bound bailiff, purſuant to his truſt. But it appearing that this writ, though returnable in *Eaſter term* 1751. was not carried to the ſheriff's office, or tendered to the under-ſheriff, till *April* 1752. the court thought it unreaſonable to oblige the ſheriff to make a return. 2 *Barnes* 341. and the now ſtat. 20 *Geo.* 2. *c.* 37. *ſ.* 2. whereby ſheriff is not obliged to return writs ſix months after expiration of his office.

Rule for late ſheriff to return writ of *Capias* diſcharged, it not having been carried to ſheriff's office till a year after it was returnable.

The under-ſheriff of *Hampſhire* ſhut himſelf up, and could not be perſonally ſerved with a rule to return the writ of *Capias ad reſpondendum*. Rule that leaving a copy at his houſe ſhall be good ſervice. 2 *Barnes* 31.

How to ſerve rule on ſheriff who abſconds.

Motion for an attachment againſt the ſheriff of *Middleſex* for not returning a writ of *Capias ad reſpondendum*, upon affidavit of ſervice of the rule on the under-ſheriff: *Per Cur'*, Be it ſo, the attachment muſt be againſt the ſheriff, and the ſervice is proper upon the under-ſheriff. *Barnes* 22.

Service on under-ſheriff ſufficient.

The court granted a rule for an attachment againſt the ſheriff of *Middleſex*, for not returning a writ purſuant to a peremptory rule, upon an affidavit of ſervice of ſuch rule on *Benſon*, who was ſworn to be as under-ſheriff, and not to be under-ſheriff. *Barnes* 23, 293. *Rep. and Caſ. of Pract. C. P.* 381. *Pract. Reg. C. P.* 381.

Service on *Benſon* good.

An under-ſheriff returned a *Fi. feci*, and a *Venire exponas* ſued out, after two or three rules upon the ſheriff to make a return, and failure therein; an attachment was granted againſt him, the court declaring they never would grant it againſt the high-ſheriff for not returning the writ. And ſuch a rule the ſame term in the like caſe againſt the under-ſheriff of *York*. 12 *Mod.* 454. See *Rep. and Caſ. of Pract. C. P.* 87. *March* 54. *pl.* 81.

Court will not make a rule on the high-ſheriff to return a writ.

Attachment *Niſi*.

Rule *Niſi* for an attachment againſt the ſheriff of *Merionethſhire* for not returning *Teſt. ca. ſa. Barnes* 27. *Pract. Reg. C. P.* 381.

Of returns in reſpect to the old and new ſheriff.

The ſheriff that begins an execution ſhall end it, (and conſequently make the return) though his office be expired, 2 Ld. *Raym.* 1073. *Salk.* 323. except the writ indorſed with the ſaid return be delivered over to the new ſheriff.

Languidus in priſona. Dalt. 516.

Upon the *Cap'* the ſheriff returns *Languidus in priſona*, and a diſtreſs iſſues to the new ſheriff to make the former ſheriff to have his priſoner; and the new ſheriff returns iſſues on the former ſheriff, and an *Alias diſtringas* iſſues againſt the ſheriff. And after one of the counſel would have ſurmiſed, that the ſheriff againſt whom the diſtreſs iſſued was dead.

What muſt come in way of return.

But by the court, he ſhall not have this by way of ſurmiſe, but it ought to come in by return of the ſheriff. *Dy.* 25. *a.*

New ſheriff not concluded.

The return of the old ſheriff ſhall not conclude the new ſheriff. On a *Fi' fa'* the ſheriff returns *quod cepit bona ad valentiam* 10 l. and *non invenit alios tores*; whereupon there went out to the new ſheriff a *Venditioni exponas*, who returned that his predeceſſor *non cepit bona, & ideo, &c.* and held good. 9 *H.* 6. *Cro. Jac.* 73.

Bailiff of a liberty concluded by ſheriff's return.

In caſe againſt a bailiff for the falſe return of *Nulla bona* upon a *Fieri facias*, the queſtion was upon the evidence at the trial, whether the bailiff of a liberty ſhall be concluded in point of evidence by the return of the ſheriff? And *per Curiam*, he is concluded. And if the ſheriff makes any other return than that which the bailiff makes to him, he may have his action againſt the ſheriff. And it was ſaid that *Holt* Chief Juſtice was of this opinion. 36 *Hen.* 6. 40. Ld. *Raym.* 184.

Ca. ſa. Habere fac. ſeiſin. poſſeſſionem, Fieri fac'.

General writs of execution (except *Elegit*) as *ad ſatisfaciend'*, *Habere fac' ſeiſinam*, *Habere poſſeſſionem*, *Fieri fac'*, *Liberate*, *&c.* which are final proceſs, and after which no judgment is given nor further proceſs; and when matters *in fact* only to be done, as land to be delivered, *ſeiſin* is

goods ſold, &c. are good, though the words be not returned or filed (if the execution be duly made.)

But in caſe of an *Elegit* otherwiſe, becauſe the extent is to be made by inquiſition, to the intent that the court may judge of the ſufficiency of it. And every inquiſition ought to be of record. *Elegit* muſt be returned, and why.

Capias in proceſs muſt be returned. 4 *Rep.* 67. In other caſes the party is at the end of the ſuit; otherwiſe of a *Cap' in proceſs*, for the end of the arreſt is, that the defendant ſhall appear. 5 *Rep.* *Cap'* in proceſs muſt be returned.

The writ of *Retorn' habend'* is not returnable. 2 *Rol. Abr.* 434. *Retorno habendo.*

The ſheriff was ordered to return an *Hab' fac' ſeiſinam*, the execution is good, if he do not return it. But perhaps a writ of error in parliament may be brought; and if he will not return it, the court ſhall amerce him. *Rol. Rep.* *Habere fac' ſeiſinam.*

The writs of *Rediſſeiſin* and *Poſtdiſſeiſin* are *Vicountiels*, and not returnable; and the ſheriff ſhall hold the plea, and give judgment. 2 *Inſt.* 82. *Rediſſeiſin, Poſtdiſſeiſin.*

So writs of *Admeaſurement of paſture*, and of *dower*, and the parties may thereupon plead before the ſheriff in the county. But theſe pleas may be removed out of the county-court by *Pone.* 2 *Inſt.* 369. *Admeaſur' de paſtur', dower.*

Where the ſheriff returns *Cepi corpus & paratum habeo*, and brings him not in, then the writ of *Duces tecum* ſhall be awarded, to have the body in court *ſub pœna.* *Bulſt.* 82. *Duces tecum.*

Scire fac' iſſues out of *Chancery* to the ſheriff of *H.* and the juſtices of peace, to call *L.* before them to take ſecurity of the peace. *L.* enters into a recognizance, and the ſheriff returns; this matter is not good, the juſtices ſhould have returned too. For the viſcount does not meddle with them as ſheriff, but by virtue of his commiſſion only. 21 *H.* 7. 20, 21, &c. 2 *Rol. Rep.* 257. Security of the peace. The ſheriff not to return *ſeparatim.*

If a writ be directed to a place where there are two ſheriffs, as *London*, *Briſtol*, &c. and one of them doth return the writ, it is inſufficient; for it muſt be returned in both their names, though one (according to cuſtom) may execute it. *Bro. Abr.* tit. *Office and Officer*, *pl.* 22. Where there are two ſheriffs, and one returns the writ.

Two bailiffs of a franchiſe.

But if a warrant be directed to two bailiffs of a franchiſe to execute a writ, the return of one of the bailiffs in the name of both is ſufficient. *Cro. Eliz.* 512.

How the ſheriff ought to return the writ executed in the time of the old ſheriff.

If a writ directed to the ſheriff be executed, and after a new ſheriff is choſen, the new ſheriff ought to return the writ in this manner, *(ſcil.) Recepi hoc breve prædeceſſori meo directum ſic indorſatum*, &c. 19 *Vin. Abr.* 176. (C) *pl.* 1.

So of a bailiff of a franchiſe.

So if, upon a warrant directed to the bailiff of a franchiſe to execute a writ, it be ſerved; and after and before the return of it, the bailiff is removed, and a new bailiff choſen, the return to the ſheriff ſhall not be in the name of the old bailiff, but of the new bailiff in the manner aforeſaid; for the old bailiff is now a meer ſtranger. *Ibid. pl.* 2.

Quære, for no doubt he is ſtill liable for his own neglects, &c. *Compl. Sher.* 152.

How if it be not executed by the old ſheriff.

But if a writ directed to the ſheriff is not executed by him before he is removed, and another choſen, and after the writ is executed; this ſhall be returned generally in the name of the new ſheriff, without any mention of his predeceſſor. *Dalt.* 517. 2 *Roll. Abr.* 548. *pl.* 3.

Simile of a bailiff.

The ſame law is of a bailiff of a franchiſe. *Id. pl.* 4. If a writ be executed by one ſheriff, and before the return of it a new ſheriff is choſen, he ought to return the writ, and not the old ſheriff, becauſe the new ſheriff is now the officer of the court. 19 *Vin. Abr.* 177. *pl.* 2.

Error that *J. S.* was not then ſheriff.

The record is, that the *Venire fac'* to try the iſſue was returned by *J. S.* ſheriff of the county of *D.* It was aſſigned for error, that *J. J.* was not then ſheriff of the ſaid county. And it was certified by a record under the ſeal of the *Exchequer*, (*viz.*) that he was ſheriff; upon which the judgment was affirmed. But ſome are of opinion, that this cannot be aſſigned for error againſt the record of the court. *Compl. Sher.* 153.

Where appearance cures the return.

If the writ be returned by one that was not ſheriff, it is a manifeſt error; but if the defendant appear

pear afterwards and plead, it is not material; for his appearance hath made it good. *Cro. El.* 582.

If the ſheriff ſhall return *Mandavi ballivo libertatis*, and ſhall not therein ſet down the proper name of the bailiff, this is good. 19 *Vin. Abr.* 185. *pl.* 13. Return to *Mandavi ballivo, &c.*

The ſheriff cannot ſerve a writ in part, and write to the bailiff of a liberty to execute the other part; as a writ ſerved as to part of the jurors, but if the ſheriff upon a *Capias* in debt againſt three, return that he had taken two, and as to the other *Mandavit ballivo libertatis, &c.* good. Not part by ſheriff, and part by bailiff, liberty.

The common form of *Vic' ret'* is, *Feci quoddam warrant'*; but to the bailiff of a liberty, *Mandavi, &c.* 2 *Rol. Rep.* 263. Common form.

Præcipe quod raddat was awarded *Vicecomitibus Glouc' verſus* A. B. *and* C. The ſheriffs return, that the ſaid *C.* was one of the ſheriffs of the ſaid city. *Ideo ego præfat' C. &c. alter vicecom' civitat' prædict' meipſum ſecundum exigentiam brevis iſtius ſummonere non poſſum.* It was adjudged a good return. *Bendl. pl.* 160. Sheriff cannot return he ſummoned himſelf.

The return was in this form, upon a writ of *Entry* againſt *Edw. Mytchell, Thomas Wykes* and others.

Summ' infranominat' Edward Mytchell, R. Fenn *and* J. Denn, *& quoad ſumm' prædict'* Tho' Wykes, *juſticiar' infraſcript' certifico quod idem* Thomas, *& ego* Thomas Wykes *jam unus vicecomit' civitatis prædict', ſum unus & idem, non alius neque diverſ', ideo ego præfat'* Thomas *&* Hugo Hyde *alter vic' civit' prædict' meipſum ſecundum exigentiam brevis iſtius ſumm' non poſſumus. Reſponſ. prædict.* Thomæ Wykes *and* Hugonis Hyde *vic. Anderſ.* 110. *pl.* 21. Simile.

If a writ to inquire of damages be directed to the ſheriff, he ought not to make ſuch a return, that he had commanded ſuch a bailiff of ſuch a liberty, *&c. Cui executio praedict' brevis totalit' reſtat fienda, & quod alibi infra com' prædict' per ſe fieri non potuit, qui quidem ballivus ſic ſibi reſpondet*, and ſo ſets down an inquiſition before the bailiff, and 40 *l.* damage. This return is erroneous, untrue, and againſt law; The ſheriff cannot return a *Mandavi* upon writ of *Inquiry*, directed to himſelf to be executed.

becauſe the warrant was directed to the ſheriff himſelf to be executed in any part of his ſhire, and no *Venue* contained in this inqueſt of office, as there is in other writs, which intitles the bailiffs of liberties. But becauſe there were divers precedents of this form, the court would not reverſe it. 19 *Vin. Abr.* 194. *pl.* 2.

If the ſheriff return, that the bailiff of a franchiſe (who had return of writs) had returned, &c. this is good, although he doth not ſhew of what place he is bailiff. 29 *Ed.* 3. 1. *b.*

New proceſs, becauſe the return was miſtaken.

W. had a *Cap. ad ſatisfac.* to the ſheriff of *Middleſex*, and makes precept to the bailiff of the dutchy, and the precept was *ad capiend'* H. *ad reſpond'* W. where it ſhould be *ad ſatisfaciend'*, and the bailiff returns the precept ſerved, and the ſheriff returns to the court *Cepi corpus ſecundum exigentiam brevis*; it was moved to have a new *Cap' ad ſatisfaciend'* againſt *H.* for though the ſheriff by his return had charged himſelf to the plaintiff, ſo that he may demand execution againſt him; yet where in truth the defendant was never taken in execution for the debt, as here, but only taken *ad reſpondend'*, there the plaintiff is at liberty to take new proceſs againſt the defendant; which the court granted. *Yelv.* 52.

Mandavi ballivo qui nullum dedit reſponſum. 2 *Saund.* 99.

Mandavi ballivo upon *Fieri facias*, and upon *Non omittas* awarded. *Vic' ret' Nulla bona. Saund.* 305.

Form. Omiſſion.

Sometimes the return is inſufficient for omiſſion of words: as where the return was, *Reſiduum hujus brevis apparet in quâdam ſchedulâ*, for *Reſiduum executionis hujus brevis. Fitzherb. Abr.* tit. *Ret.* 14.

Scire fac' ſchoolmaſter.

And the ſheriff is bound to take knowledge of the law in making his return; therefore in a *Scire facias* to *L. B.* maſter of the *Grammar School* of S. &c. and to the ſcholars of the ſame be returned that *Scir. fecit* to the maſter, and doth not ſay to *L. B.* maſter. *Bro. Abr.* tit. *Ret.* 88.

In a *Scire fac.* the ſheriff returned *Scire feci* A. B. *modo & forma prout iſtud breve exigit & requirit*, and ſaid not *infranominat'* A. B. yet *per Cur'* it is good, for

for theſe words *prout hoc breve exigit* are tantamount. *Bro. Abr.* tit. *Return de Briefs, pl.* 64. Ld. *Raym.* (*Rep.* 21.) ſays, if there is the ſubſtance it matters not if there is not the expreſs form.

The ſheriff returned *non inveni*, for *non eſt inventus*, and the party thereupon was outlawed; this was aſſigned for error, and not amendable. *Fitzherb. Abr.* tit. *Return* 19. Return *Non inveni* is error.

A return by the ſheriff in the third perſon is not a good return. The ſheriff returned, *quod præcepit ballivo de* S. for *præcepi ballivo*, and he was amerced for it. 21 *Aſſ.* 17. A return in the third perſon not good.

The teſte of a writ was 2 *Martii* 11 *Eliz.* the return was *In quarta ſeptimana quadrageſimæ prox' futur'*. The words *prox' futur'* refer to *quarta ſeptimana*, not to *quadrageſimæ*. *Mo.* 365. *pl.* *Prox' futur'* how to refer.

In treſpaſs the ſheriff returned in the *Common Bench*, that the defendant was attached *per catalla ad valentiam de* 10 *l.* It is a void return, for he ought to return he was attached by one beaſt or chattel certain, and name them, that ſo they may be forfeited. *Cro. Eliz.* 13. *Ander.* 51. That the defendant was attached *per, &c.* how to be returned.

In outlawry of murder the ſheriff returns, *Ad comit' meum tent' apud* D. *en le county de* Northumberland, and ſaith not *in comitat' meo Northumbriæ tent', &c.* it is error, for one may be ſheriff of *Cambridge* and *Huntingdon*, and of *Surry* and *Suſſex*. 2 *Rol. Rep.* 52. Return in outlawry.

Action of the caſe upon eſcape of one taken by *Ca. ſa. ret. Paſchæ* 16 *Car.* 2. on a judgment entered in *Mich.* 16 *Car.* 2. which is repugnant and impoſſible; and this moved in arreſt of judgment on the return of a writ of *Inquiry*. But the teſte appearing to be *Jan.* 16 *Car.* 2. *ret' craſt' Aſcan'*, and that *virtute brevis poſtea & antea return'*, *viz.* ſuch a day of *May* 16. which ſhould be 17. *Court*, This is a void return, (*viz.*) being expoſitive only. 2 *Keb. Rep.* 101. *pl.* 29. Time.

In a replevin on the *Cauſam nobis ſignifices*, if the ſheriff return, that the beaſts cannot be delivered, *quia viſum inde habere non potuit*. This is not good, becauſe he doth not ſay *acceſſit ad locum*; for perhaps Return void for uncertainty or repugnancy.

haps he could not have the view, becauſe he did not go where the beaſts were. 2 *Ed.* 3. 54. *b.*

Uncertain return of the exigent.

Outlawry was reverſed, becauſe the exigent had an uncertain return. 2 *Rep.* 141.

Prout ſibi conſtare poterit, &c.

If a *Capias* comes to the ſheriff to take a man, it is no return that he was found within his bailiwick after the delivery of the writ, *prout ſibi conſtare poterit.* This is not good, but he ought to return expreſly, *quod non eſt inventus.* 9 *H.* 6. 57.

Simile.

So in a *Fieri fac' de bonis teſtatoris* againſt executors, if the ſheriff return that they have not any goods in *ballivâ ſuâ*, after the delivery of the writ *prout ei conſtare poterit:* This return is not good; for he ought to take notice whether they had goods or not, and ſo return it. 9 *H.* 6. 57. *b.*

Return on aſſets.

But in debt againſt an executor, who pleads *Plene adminiſtravit*, and aſſets are found; upon a *Fieri fac'*, the ſheriff returns that he had nothing within the ſame county; it is a good return. *Bendl. p.* 91.

Uncertain.

Upon *Habere fac. ſeiſinam* the ſheriff returns, that the party who ought to take the *ſeiſin*, *non proſecutus eſt breve.* This is not good; for the uncertain intendment of it, and the coming of the ſheriff to have ſeiſin, is not properly a proſecution of the writ. *Compl. Sher.* 158.

Repugnant.

On entry *ſur diſſeiſin* of two acres, *Hab' fac' ſeiſinam* was awarded. The ſheriff as to one acre returns *Habere feci*, as to the other *Tarde*; the ſheriff ſhall be amerced for ſuch a return, as being contrary and repugnant in itſelf. As in *Ca. ſa.* againſt two, the ſheriff returns as to one, *Cepi*, and as to the other, *Tarde*; he ſhall be amerced. 2 *Leon.* 175. *pl.*

In debt againſt the heir.

Debt againſt the heir: if the defendant pleads, Nothing deſcended to him but an houſe in *B.* upon which judgment is given for the plaintiff; *ſed quia ignoratur* of what value the houſe was, a writ iſſues to the ſheriff to inquire of the value, and according to that to make execution; and the ſheriff returns, that the heir ſold the houſe before the writ came to him. This is not a good return. 19 *Vin. Abr.* 180. (G) *pl.* 2.

If

If in action of debt againſt the executors the defendant acknowledgeth the action, on which a *Fieri fac'* iſſues, the ſheriff may return *Nulla bona, &c.* for this ſtands with the judgment, in as much as he confeſſed the action; but not that he had goods. 2 *Rol. Abr.* 459. *pl.* 3. In debt againſt the executor.

Upon *Habere fac' ſeiſinam*, upon a judgment againſt *J. S.* it is no good return for the ſheriff to return, that *J. S.* had nothing in the land, nor was tenant. 17 *Ed.* 3. 66. *b.* *Ha' fa' ſeiſinam.*

The ſheriff on *Levari* returns, that he had levied the ſaid ſum (which was 2000 *l.*) and in debt he pleads as to 308 *l. Nil debet*, and as to the reſt a releaſe from the plaintiff; the plaintiff demurs. Now the plea of *Nil debet* is ill, and the ſheriff is eſtopt to plead it; for it is contrary to the return. But *per Cur'*, ſince they have not relied upon the eſtoppel, but taken iſſue, that could give them no advantage. *Hob.* 206. Sheriff pleads. Eſtoppel.

What ſhall excuſe the ſheriff for his not returning, and what ſhall not.

The ſheriff returned a reſiſtance on *Habere fac' ſeiſinam*, and he was amerced 20 marks; becauſe he did not take the *Poſſe comitatus*, and an *Alias* awarded. *Hil.* 19 *Ed.* 2. *Execution* 147. What excuſe for not returning a writ.

On *Habere fac' ſeiſinam*, it is a good return to excuſe the ſheriff, that he at all times was ready to deliver *Seiſin*, and appointed divers times in certain for the party to come to the land to take *Seiſin*; but none comes for the party to receive it. 2 *Rol. Abr.* 459. (H) *pl.* 1. *Rol. Rep.* 51. *pl.* 21. That none came to make ſeiſin.

So he ought to excuſe himſelf from the time before the day aforeſaid, otherwiſe the return is not good; for peradventure he was requeſted before, and would not perform it. 19 *Vin. Abr.* 182. (I) *pl.* 1. *Id.* 183. *pl.* 2.

It is no good return for the ſheriff to ſay, that the party will not pay his fees, and therefore that he will not execute the writ. *Bro. Abr.* tit. *Retorn de Brief*, That he is not paid his fees.

Brief, pl. 10. The very words of the writ do enjoin the ſheriff to make return of it; and if he be not paid his fees where he is allowed to take them, he may recover them by action. *Compl. Sher.* 160.

Though inferior court be not bound to allow a writ, yet they muſt return.

If a writ out of the *King's Bench* be directed to an inferior court, which the inferior court is not bound to allow, but may proceed notwithſtanding the writ directed to them; yet they ought to make a return upon the writ, and in the return to ſhew the cauſe: for the writs from above ought to be obeyed. 2 *Lil. Abr.* 583.

Sheriff cannot return a protection on arreſt.

Sheriff returned a protection on arreſt. It was ſet aſide by the court, in regard the ſheriff can return nothing but *Non eſt inventus* or *Cepi corpus*, at his own peril, and it is in his diſcretion to allow or diſallow any protection, and the ſheriff was ordered to return his writ on a pain. 2 *Keb. Rep.* 681. *pl.* 72.

May return a *Superſedeas* with the body.

If a man be taken in execution at the ſuit of the king; afterwards a *Superſedeas* comes to the ſheriff, by 2 *H.* 7. *fol.* 7. he may return the *Superſedeas* with the body.

What if the party diſcharge him.

So the ſheriff is to return the *Capias* and the body at the day; but if the party diſcharge him, this is a good excuſe. 3 *Bulſt.* 96, 97.

And note, if a writ cannot legally be executed the day on which it is returnable, it ſhall not the following day, or, at any time after. 6 *Mod.* 159.

Property.

In replevin if the ſheriff returneth, that the defendant claimeth property, it is a good excuſe. 19 *Vin. Abr.* 183.

Cuſtom.

The ſheriffs of *London* may return their cuſtom. *Dalt. c.* 73.

Mandavi ballivo libertatis, qui nullum dedit reſponſum, is a good return to excuſe. *Bro. Abr.* tit. *Return de Brief, pl.* 46, 89.

Tarde is an excuſe,

So, that the plaintiff *non invenit plegios de proſequendo.*

Amendment of return.

This was an information for a libel. And it was now moved for a new trial. The reaſon given for it

t was, that the verdict was ill; inaſmuch as it appears that the jury was not returned by the proper officer. And to ſhew this, they ſaid, that the *Diſtringas* was returned by *John Groſvenor Mil'* and *Thomas Lome Mic'*, whereas there was no ſuch ſheriff of *London* as *Thomas Lome Mic'*, but *Thomas Lome Mil'*; and this was verified by affidavit. The court ſaid, Unleſs ſomething farther appears, this is a good exception; for they muſt take it upon what lays before them, that *Tho. Lome Mic'* is a different perſon from *Tho. Lome Mil'*, and if it was a different perſon that made the return, from the perſon that was ſheriff, it would certainly be ill; and there is no other way to take advantage of it but this, by moving for a new trial, and making affidavit that ſuch an one was ſheriff at the time of the return, who appears to bear a different name from him, whoſe name is annexed to the return. Upon which the attorney general ſaid, that the ſheriff's adding his title of knighthood at all to his ſigning the return is ſurpluſage; and therefore his doing it in an improper manner ſhall not make ill what was good before. He admitted indeed, that this addition was neceſſary in declarations, deeds, *&c.* for it is part of the deſcription of the perſon, as it was determined in the caſe of the biſhop of *Cheſter*; but when a man ſubſcribes his name, thoſe additions are always omitted. But the Chief Juſtice ſaid, That there is no ſuch thing as ſurpluſage in the names of perſons; and therefore unleſs ſomething elſe appears, they muſt intend that a different perſon made the return than ought to have done it. Then the attorney general deſired time of the court, that he might be able to verify, that *Tho. Lome Mil'* did actually make the return; and prayed that a rule might be made, upon *Tho. Lome Mil'*, one of the ſheriffs of *London*, to attend and inform the court, whether he did not make this return, and that upon his ſo informing the court the return might be amended. This proceeding, the attorney ſaid, was warranted by 9 *Rep.* 31. The court ſaid, that this was a new point;

See before,

How far the court will give leave, that a return to a writ may be amended.

and therefore ordered it to be ſpoke to again next term. *Barnard. K. B.* 37. *Fitzgib.* 5. *pl.* 1.

Venire. On a *Venire fac'* no return was indorſed, nor any name of the ſheriff on the back of the writ, nor *quod executio brevis patet in quodam panello, &c.*

De novo. Stat. 18 *El. c.* aids inſufficient returns; and it could not be amended after verdict, and a new *Venire fac'* iſſued. 5 *Rep.* 41.

Miſpriſion. 8 *H.* 6. *c.* 12. extends to returns; but yet miſpriſion of clerks are only to be amended. But it extends not to a return by the ſheriff where it ſhould be to a coroner; nor doth 18 *Eliz.*

Ven. fac. Nor to a return of a *Venire fac'* without the name of the ſheriff. *Co.* 8 *Rep.* 162.

By one ſheriff only. The *Venire fac'*, and other proceſs, is directed *Vicecomitibus de Canterbury*, and the return is made by one ſheriff only. The court amended this at Common law, and not upon the ſtatute of *Jeofails*. And they ſwore the jury there, that there was but one ſheriff in *Canterbury*. *Sid.* 244.

Album breve. *Album breve* returned is not amendable. *Mo. Rep.* 1196.

Where the return of the ſheriff ſhall be amended, as well after verdict as before. 10 *Rep.*

Where the ſheriffs return no writs. Having now treated largely of the inſufficiency and validity of returns in general, I ſhall conſider how the law is in caſes where the ſheriff doth not return the writ; or what act, proceſs or appearance, ſhall be good before the return, and the penalty on the ſheriff for not returning.

Inheritance. Where a man is to loſe an inheritance if he do not appear, he ſhall appear without the return of the ſheriff *gratis*, by day in the roll. 10 *H.* 7. 11.

Corporal pain. Where a man is to have a corporal pain if he doth not appear, he may appear without the return of the ſheriff *gratis*. *Id. ibidem.*

Exigent. In treſpaſs. If after the *Exigent* is iſſued, the defendant renders himſelf, and had a *Superſedeas*, he may appear by the roll, although the ſheriff doth not return the *Exigent* at the day. 38 *Ed.* 3. 20. *b.*

In a writ of debt, if no original be returned, nor any return made, yet the defendant may appear by the roll. 29 *Ed.* 3. 19. Debt.

In a writ of debt, if the ſheriff return the original *nihil*, &c. yet the defendant may appear for fear of a *Capias*. Upon a *Nihil.*

The court will diſcharge priſoners on common bail in two terms. (2.) They will inflict penalties on ſheriffs, for not making deputies; and will (whether in office or not) impriſon them for not returning of writs by the day, and not leave them to amerciaments, or *Diſtringas nuper vicecomit'*. 2 *Keb.* Rep. 812. *pl.* 14. Penalties on the ſheriffs for not returning.

In *Bulſtr.* 201, 202. an *Habeas corpus* was directed to the warden of the *Fleet*, to bring in the body of a priſoner in his cuſtody; who refuſing to make his return, another day was given him upon pain to return the body. Warden.

If the ſheriff takes *J. S.* upon a *Latitat* or *Capias*, and doth not return the writ, an action lies againſt him. Action.

Though a ſheriff be out of office, yet if it appears, that during his being in office he has made a falſe or fraudulent return, or wilfully refuſed, neglected or delayed the execution or return of a writ, the court will ſend for him into cuſtody, or order an indictment or information againſt him. See 2 *Show.* 87. a ſheriff laid by the heels for not returning a *Fi' fa'*. See *Indictments againſt ſheriffs*, *Tremain* 123.

In partition, or other real action, if the ſheriff return the tenant ſummoned, when in truth he was not, action of *Deceit* lies againſt him. 26 *Aſſ.* 48. *Brownl.* 157. Actions againſt ſheriffs for falſe returns.

So in a real action, if the demandant deliver a writ of *Summons* to the ſheriff, and the ſheriff ſummoned the tenant accordingly, and after does not return the writ, *Action on the caſe lies* againſt him.

So if the ſheriff return one ſummoned or proclaimed, which is not, action on the caſe lies; but this is not aſſignable for error. *Mo.* 349.

Action

Delivery on inquiſition.

Action on the caſe lies againſt the ſheriff for returning, that he had delivered to the plaintiff, upon inquiſition taken, where he refuſed to deliver it, and ſo the return is falſe; though it was objected, that perhaps the poſſeſſion is kept againſt him *manu forti*. But *per Cur'*, that is but mitigation of damages; but his return was falſe, and therefore the action lieth. *Rol. Abr.* 738.

Exigent.

If the ſheriff return *Exigent* 3 *aut* 4 *exact'*, that there were not more counties, where in truth there was a fifth county, the plaintiff ſhall have action on the caſe againſt him. 9 *H.* 6. 60. *b.*

Sheriff may diſavow a return made by another perſon in his name the ſame term.

Holt ſaid, if a writ comes to a ſheriff, and another make a return to it in his name, the ſheriff may come and diſavow it the ſame term, but not in a ſubſequent one. 12 *Mod.* 308. 2 *R. Raym.* 885.

Action againſt ſheriff for falſe return.

Upon writ to ſheriff, he firſt made warrant to bailiff, who arreſted the party, and ſuffered him to eſcape, and then ſheriff returned *Mandavi ballivo*; upon affidavit of fact ſheriff was ordered to attend, and agreed action lay againſt ſheriff for a falſe return, as *Non eſt invent'*, *&c.* and his amerciaments were eſtreated. 12 *Mod.* 311.

Non eſt inventus.

Sheriff arreſts the party, and yet returns *Non eſt inventus*; action on the caſe, or treſpaſs for falſe impriſonment lies againſt him; for he is a treſpaſſer *ab initio*. *Cro. El.* 729. 18 *Ed.* 4. 18.

Cepi Corpus on ſtat. 23 *H.* 6.

Action on the caſe was againſt the ſheriff, for that he arreſted *J. S.* and ſet him at large, *abſque aliquâ ſecuritate inventâ* for his appearance, and at the day returned *Cepi corpus*, and that the ſaid *J. S.* did not appear at the day, but hid himſelf; and that upon an *Habeas corpus* awarded, he returned *Paratum habeo*, which was *Faux*, whereby the plaintiff was delayed in his ſuit, *&c.* The defendant pleaded, that *J. S.* being arreſted, put him in ſureties for his appearance, *J. N.* and *J. D.* who are perſons of ſufficient eſtate within the county, and were bound to him in 40 *l.* for appearance of *J. S.* at the day in the writ mentioned, and pleaded the ſtatute of 23 *H.* 6. *c.* 10. by reaſon whereof he let him at large, and

and traverſeth, *abſque hoc*, that he let him at large, *abſque aliqua ſecuritate inventa prout*, &c. *Cro. El.* 624.

And the court held the plea and traverſe to be good; for he is by the ſtatute compellable to take bail, and it is left to his diſcretion what bail to take: and although he had not the body at the day, and afterwards at the day of the *Habeas corpus* returned *Quod paratum habeo*, when he was at large, that is a contempt to the court, and finable; but it is nothing as to the party, nor can he take advantage of it.

So that the law which has been diſputed is ſettled, that where the ſheriff takes bail according to the ſtatute of 23 *H.* 6. and returns *Cepi corpus*; though the party do not appear at the day, yet the ſheriff ſhall not be charged in an action on the caſe for a falſe return. *Sid.* 22, 23. 2 *Sid.* 28. *Mo.* 590.

Upon bail, ſheriff not charged returning *Cepi corp.*

For the ſtatute of 23 *H.* 6. is a general ſtatute, of which the judges ſhall take notice; but if it does not appear to be a return within the ſtatute, but at Common law, therefore his non-appearance actionable. And there is a caſe in *Siderfin* on this point which is worth obſervation, as to laying the action and pleading.

23 *H.* 6. 10. a general law in ſome caſes.

Action on the caſe was brought for a falſe return, *i. e. Cepi corpus*, and yet he had him not at the day, but ſuffered him to eſcape. The defendant demurs to the declaration. Now the action is good, becauſe the declaration ſhall be taken to be true upon this demurrer. And the ſtatute of 23 *H.* 6. is in part a private ſtatute, and the court will not take notice of it without pleading it. But had the defendant pleaded it ſpecially, or had he pleaded Not guilty, he might have had advantage of this ſtatute, and have ouſted the plaintiff of his action. After the ſaid ſtatute the ſheriff cannot make a ſpecial return, but *Cepi corpus*, or *Non eſt inventus*. So that *Sid.* 22, 23. as to that point, is good law, for ſuch action lies not properly againſt the ſheriff, becauſe the ſtatute 23 *Hen.* 6. compels him to bail the priſoner; and yet

Cepi corp. on ſtat.

Pleading it.

yet the ſheriff ſhall return a *Cepi corpus*, as formerly. *Sid.* 439.

How private. Now it is ſaid that 23 *H.* 6. *c.* 10. is a private ſtatute, and ought to have been pleaded. 2 *Saund.* 154.

How publick. Now that ſtatute, is a private law as to ſheriffs bonds; but as to extortious fees, it is a public law. 2 *Keb. Rep.* 626, 657. *Mod. Rep.* 33.

Debt *verſ. vic'*, if he levy the money on *Levari.* If a ſheriff levy money on a *Levari facias*, upon a Recognizance, at the ſuit of *J. S.* and returns the writs ſerved, *J. S.* may have debt againſt the ſheriff, or againſt the ſheriff's executors. But in this caſe the plaintiff demurred to the defendant's plea, and concluded ill. The plea was grounded on a releaſe, and he ſhould have demanded judgment, if the defendant ſhould be admitted to plead a releaſe made after the ſheriff made his return. *Rol. Abr.* 518. *Brownl.* 57. *Hob.* 206.

Sheriff accepts return of a ſtranger. Action on the caſe lies againſt a ſheriff, who accepts of a return of one that is not bailiff, and againſt him that made the return. *Mo.* 431.

Againſt bailiff of a franchiſe. Action on the caſe lies againſt the bailiff of a franchiſe for negligent execution, or a falſe return. *Id. ib.*

For making other return. Action on the caſe lies againſt a ſheriff for making other return than is returned to him by a liberty or bailiff of a franchiſe, who had *Returna brevium. Rol. Rep.* 119.

Where the action lies againſt the ſheriff or bailiff of a franchiſe on a falſe return. Upon a *Fieri fac'* againſt an adminiſtrator, the ſheriff makes a warrant to the bailiff of a franchiſe to execute it, and after the bailiff is removed, and another bailiff elected; and after the old bailiff returns in his own name to the ſheriff, that the adminiſtrator had not any goods *præterquam*, *&c.* which is falſe, and after the ſheriff makes return accordingly to the court; yet no action on the caſe for this falſe return lies againſt the bailiff. For the return ought to have been made of the new bailiff, and ſo the ſheriff had accepted a return from one as it were a mere ſtranger, and ſo void. And *he ought to take cognizance of the right miniſters of law*; and therefore

the old bailiff for his falſe return is not puniſhable by the law, but the ſheriff. *Rol. Abr.* 99.

If the ſheriff return *Mandavi ballivo libertatis, &c. qui mihi reſponſum dedit, &c.* If the matter of the return be falſe, no action lies againſt the ſheriff, but only againſt the bailiff: for the ſheriff ought to accept the return of the bailiff, and not examine the reality of it, (if it be ſufficient in law). *Rol. Abr.* 798, 29. *Cro. El.* 512. Falſe return of bailiff of liberty.

If a *Venire fac'* comes to the ſheriff in a *Quare impedit*, and the ſheriff commanded the bailiff of the liberty of *C.* to return the panel, who does it accordingly, where he had not any warrant to do it, not being bailiff of a franchiſe, whereby the panel is quaſhed. The plaintiff for this default in the ſheriff, and for his damages, ſhall have an action on the caſe. 38 *Aſſize* 13. Againſt the ſheriff for a return by one who is not bailiff of a franchiſe.

The ſheriff upon a *Fire facias* againſt *J. P.* makes warrant to *J. S.* to execute as his bailiff, and he does it; and afterwards the ſheriff makes a falſe return, (*viz.*) that the writ came *Tarde, &c.* by which he is a treſpaſſer. 2 *Rol. Abr.* 562. Againſt the ſheriff, and not againſt the bailiff.

It was the opinion of all the judges that the ſheriff's ſubmiſſion to a fine, is no concluſion to the parties grieved, to bring their action for the falſe return of the ſheriff, if it were ſo. *T. J.* 39. Sheriff ſubmits to a fine.

In return on *Elegit*, the ſheriff returns, that he had appraiſed the goods *in ſpecie* to 40 *l.* and extended ſuch lands, and delivered them to the plaintiff. *Ubi revera* he never delivered them to the plaintiff. Action of debt lies not in this caſe, but action on the caſe; for it is no debt in the hands of the ſheriff. *Cro. Jac.* 566. Caſe, and not debt.

And it is not like to *Pyke's* caſe, which was; The ſheriff on a *Scire fac'* returned, that he had ſold the goods for ſo much money, and delivered the money to the plaintiff; and the plaintiff thereupon averring that he had not the money, maintained an action of debt: for there the ſheriff confeſſed by his return, that he had ſold the goods, and delivered the money; but here it is not returned, that he meddled with Debt.

the goods, or the value of them, ſo as there is not any certainty to charge him. *Compl. Sher.* 169.

Where action to be brought.

Action for a falſe return may be brought in the county where this was, or in *Middleſex* where the record is. *Cro. Jac.* 532. 12 *Mod.* 408.

Wales, at *Weſtminſter*.

So eſcape at *D.* in *Wales*, and the return was *Non eſt inventus*, and it was tried at *Weſtminſter*, the falſe return being made at *Weſtminſter*, which is the cauſe of the action. 2 *Keb. Rep.* 362. *pl.* 10.

Utlagat' Com' or *Middleſex.*

If a ſheriff on *Cap' utlagat'* will not arreſt the party, but return *Non eſt inventus*, an action may be brought againſt him in the county where he received the writ, or in *Middleſex*, where the record of that falſe return is, at election. *Hob.* 209. *Sid.* 219.

Elegit Com' or *Middleſex.*

A doubt was, whether action on the caſe for a falſe return on *Elegit* lies in the county where the return of the *Exigent* was, *i. e.* in *Middleſex*, or where the land lies? And the court inclined, that it lay moſt properly in *Middleſex*. *Winch* 100.

Debt in *Com' Pal.*

One brings debt againſt *B.* ſheriff of the county palatine of *Lancaſter*, and ſues him to outlawry on meſne proceſs, and had a *Capias* directed to the *Chamberlain* of the *County Palatine*, who made a precept to the coroners of the county, being ſix, to take his body, and have him before the juſtices of the court of *Common Bench* at *Weſtminſter*; one of the coroners being in ſight of him, and having a fair opportunity to arreſt him, does it not, but they all return

Ret' non eſt invent.

Non eſt inventus. The plaintiff hereupon brings his

Action in *Middleſex.*

action againſt the coroners in *Middleſex*; and the court inclined, that the action is well brought in *Middleſex*; becauſe the plaintiff's damages ariſe here by not having the body here at the day. *Dy.* 159.

Action lies not againſt one coroner.

The chamberlain returns to the court the ſame anſwer that the coroners return to him, ſo that the falſe return is the cauſe of prejudice, and the other things are but arguments to prove it. And the court conceived an action would not lie againſt one coroner, no more than againſt one ſheriff of *London*, &c. *Mod. Rep.* 198.

It was alledged for error, that the declaration was Declaration.
aught.

1. The bond was made for 200*l.* dated 29 *Auguſt*, Proceſs before the bond made.
3 *Jac.* and this was before the bond made, yet be-
ng returnable in *Mich.* term, and the *Latitat* upon
after the bond, it is ſufficient to maintain the ac-
on, and the proceſs always bears *teſte* the laſt day
f the term before.

2. The declaration is, the ſheriff's bailiffs arreſt the It is not ſhewed the defendant did not appear.
rty, and the ſheriff falſely returns *Non eſt inventus.*
was alledged for error, that the declaration was not
ood, becauſe he doth not ſhew that the bailiffs de-
vered the bond to the ſheriff, which they had taken
r his appearance; nor is it ſhewed, that the de-
ndant did not appear; *ſed non allocatur*, for theſe
rve but for aggravation of damages, and are ſup-
ied by the verdict. *Cro. Jac.* 561.

Fieri fac' for debt was delivered to the ſheriffs of
. who executed it; after which the ſheriffs were
ſcharged of their office, and new ones elected. The *Nulla bona.*
d ſheriffs redeliver to the party his goods taken in
ecution, and indorſed *nulla bona* on the writ of
eri fac', and deliver it to the new ſheriff ſo in-
rſed. And an action on the caſe was brought Action againſt the old ſheriffs.
ainſt the old ſheriffs for this falſe return, and judg-
ent *pro quer'*. And theſe exceptions were taken.

1. The plaintiff in his declaration does not ſay,
at the old ſheriffs did return *Nulla bona*, but only
at they did indorſe *Nulla bona* which is no re-
rn.

2. He ſaith not, they delivered this writ thus in-
rſed to be returned, *i. e.* by indenture.

3. It appears not whether any return of the writ Though it appear not that any return of the contrary was made by the old ſheriffs.
re made by the old ſheriffs, or the new. *Per*
n Chief Juſtice: He conceived it to be well, and
cording to the courſe of that kind, for the old
eriffs to make the return, and to deliver the writ
er by indenture to the new ſheriff; and here was
verdict. And a return is not properly a return
it be filed here; yet it is the return of the ſhe-
f in the county where he is ſheriff; and yet it
ems judgment was reverſed. *Quære Style* 474.

Non eſt inventus.

Action on the caſe on a falſe return of *Non eſt inventus* by the ſheriff of *Galloway* in *Ireland*. It was averred, that the ſheriff at the time of the delivery of the *Capias* had the perſon in cuſtody at *Galloway* in the city of *Dublin*, and the action is brought in the county of the city. *Per Saunders:* On a *Capias* delivered to the ſheriff out of the county, he is not bound to hold him there. So upon a *Latitat*, which is no warrant to the ſheriff to take him, but only in his bailiwick. *Court:* This may be by *Habeas corpus*, or freſh ſuit, and being after verdict, that finds the falſe return (for the return was *Non eſt inventus in ballivâ*) and the jury find that he was in *ballivâ* at the return of the writ, the court will preſume him legally in cuſtody. 3 *Keb. Rep.* 557. *pl.* 70. *Id.* 561. *pl.* 74. *Id.* 600. *pl.* 37.

For not arreſting the defendant *ubi potuiſſet*.

Plaintiff declares, he had proſecuted a *Capias* againſt *Chapman*, who was indebted to the plaintiff in 100 *l.* and delivered it to the ſheriff at *Newport P.* and that the ſheriff *poſtea & adtunc & ibidem potuiſſet arreſtar'* the ſaid *Chapman*; but that the defendant *machinans* to delay the plaintiff, *&c. arreſtare* the ſaid *Chapman & adtunc & ibidem abſtinuit & recuſavit*, and had falſely returned *Non eſt inventus*. Defendant pleads *Non culp'*, and verdict *pro quer'*. *Court:* After verdict the declaration is good enough; and though *potuiſſet arreſtare*, without ſhewing how, or that the defendant was in view of *Chapman*, & *potuiſſet* denotes a poſſibility, and this is true if he were in the county, and the ſheriff is not bound to attend his office in every particular caſe; yet it ſhall be intended ſuch matter was given in evidence; by which it appeared to the jury, that the ſheriff *potuiſſet arreſtare*, and the declaration, *quod recuſavit*, doth imply opportunity: but it was agreed to be good cauſe of demurrer. *T. J.* 40.

Ret. non eſt inventus.

In caſe againſt the ſheriff of *Oxfordſhire*, for a falſe return of *Non eſt inventus* to an *alias capias ad ſatisfaciendum* upon a judgment of the *Common Pleas*, recovered by the plaintiff againſt one *Edward Jones* for 21 *l.* 10 *s.* and upon error brought in the *King's Bench* affirmed, upon which the whole ſum amount-

ed

ed to 43 *l.* upon Not guilty pleaded, the cauſe was ried before L. C. J. *Raymond*, at *Niſi prius* in *Mid-lleſex*, *Mich.* term 12 *Geo.* And it appeared upon he evidence, that the ſheriff's bailiffs upon the firſt *Capias* had frequent opportunity of taking defendant; nd that when that return was out, the under-ſheriff leſired the plaintiff's attorney to take out another *Capias ad ſatisfaciendum*, and he promiſed to arreſt lefendant, but he did not, though he had opportuni-ies to arreſt him upon that writ. And the defen-lant in this cauſe upon the trial attempted in miti-ation of damages to prove, that the defendant in he original action might yet be taken, but failed in hat proof, it appearing *Jones* had abſconded; upon vhich by the direction of the Ch. Juſt. the jury gave he whole 43 *l.* debt in damages. And the defen-lant moved for a new trial; firſt, becauſe the Ch. Juſt. refuſed to admit the ſheriff's bailiff to be a vitneſs upon the trial, to prove that he often en-leavoured to have arreſted *Jones* on this *Capias ad ſatisfaciendum*, but could not. *Sed non allocatur*; for is brothers agreed with him, the bailiff was no legal vitneſs, becauſe he is intereſted in the cauſe, having iven ſecurity for his due executing proceſs, and by onſequence could not be a witneſs in his own cauſe. Then it was inſiſted upon by the counſel for the de-endant, that the damages were exceſſive, becauſe he jury had given damages for the whole debt; whereas they ſaid the jury ought to have given only he charges the plaintiff had been at in the ſuing the *Capias ad ſatisfaciendum*, *&c.* in damages. *Sed non allocatur*; for upon the circumſtances of the caſe the ourt thought it very proper, the whole debt ſhould e given in damages. Note; upon giving the ver-ict, the plaintiff entered into a rule by conſent, hat the ſheriff ſhould have liberty to uſe his name, n order to recover the debt againſt *Jones*, the ſheriff onſenting to indemnify the plaintiff againſt all coſts, *&c.* 2 Ld. *Raym.* 1411. *Stra.* 650.

When an action is brought againſt a ſheriff for a falſe return, what is good evidence to ſupport ſuch action.

In an action for a falſe return, the plaintiff de-lared, that he recovered 206 *l.* of *Alexander Urket*, nd that the ſheriff of *Middleſex* directed his war-

rant to the defendant, as high bailiff of *Weſtminſter*, to levy this money which he had recovered of the ſaid *Alexander Urket*, *unde præfat' Alexander convictus eſt*. The defendant returned upon the back of the warrant *Nulla bona*, *ultra* 1 *l.* within his bailiwick. For this falſe return the preſent action was brought. Upon the evidence at the trial this warrant was produced, but there was a blank left for the name of *Alexander Urket*, ſo that the warrant required the defendant to levy this 206 *l. quas Carolus King recuperaſſet verſus nobody*, *unde convictus eſt*. A verdict was however given for the plaintiff, ſubject to the opinion of the court upon this variance, which was argued was not material; as this warrant is, the defendant would have been puniſhable if he had levied this money of *Urket*'s effects, provided he had had any in his bailiwick; that the warrant was illegal upon the face of it, to require an officer to levy the money upon *A.* which *B.* has recovered, without ſaying that *B.* has recovered of *A.* If this was ſo, the officer could not be anſwerable for making the return, whether the return be true or falſe. For that would be to puniſh an officer, when he does not execute a writ, which if he did execute, he would be puniſhable likewiſe. On the other ſide it was argued, that if the name of a ſtranger had been filled up in the blank, he did allow the argument would hold, but as the warrant now is, it could have no other reaſonable conſtruction, but that the money was recovered of *Urket*. And this caſe was reſembled with another, that is well known, of a grant being made between *A.* and *B.* of certain lands; *Habendum* to *B.* and his heirs. This grant is clearly good; and yet the lands were not ſaid in the premiſſes to be granted to *B.* The Chief Juſtice did allow this caſe, and in the preſent caſe too inclined to think that the warrant was good, and would ſupport the declaration. He ſaid in the preſent caſe, the warrant is not ſet out *in hæc verba* in the declaration, only the ſubſtance of it; and he thought, this might be taken to be the plain ſubſtance and meaning of it. However the court ordered copies to be given them of the

warrant, and likewiſe of the declaration. *Barnard. K. B.* 364.

Argued, that the plaintiff's evidence had ſupported his declaration. That the warrant in the preſent caſe was ſuch a one as the bailiff was juſtifiable in executing. *Cro. Jac.* 288. relied on. If this was ſo, the ſingle queſtion would be, whether the plaintiff ought not to have declared upon the warrant according as the form of the warrant was, or whether ſuch a general declaration, as in the preſent caſe, would be ſufficient. That ſuch a general declaration would be ſufficient, and that the evidence does not vary from it, many caſes might be cited. One was, where plaintiff declared upon a note, as indorſee to him or order. Upon evidence the note appeared to have been indorſed to the plaintiff only, without ſaying to him or order; and yet it was held, that the evidence maintained the declaration. Again, upon *oyer* a bond appeared to have been given to *Richard* ——— *ſolvendum eidem Richardo Biſhop*; and the declaration was of a bond to *Richard Biſhop*; yet held to be ſufficient. 11 *Mod.* 275. *pl.* 23. So *Mich.* 10 *Geo.* in the caſe of Lord Viſcount *Say* and *Seal*, an indenture was produced in evidence between Lord *Say* and *Seal* of the firſt part; one *Knight* of the ſecond part; and one *Johnſon* of the third part; which witneſſeth, that for barring an eſtate-tail had granted to *Knight*, without ſaying who had granted, to the intent, that *Johnſon* ſhould bring a writ of *Entry* againſt him. The queſtion there was, whether the name of Lord *Say* and *Seal* ſhould be ſupplied, and held it might. 10 *Mod.* 45. 2 *Ventr.* 342. where a will was produced at a trial at bar, witneſſing that a certain parcel of land was deviſed to *A.* and his iſſue, and another parcel of lands to *B.* and his iſſue, and in caſe they died without iſſue, then to another. The court ordered their officer in that caſe to read it, and he read it without iſſue; and held good. Accordingly they ſaid, that in the preſent caſe the blank in the warrant ſhould be ſupplied, or the word *verſus* rejected, as being inſenſible; and therefore they hoped, the evidence well

ſupported the declaration. The court ſaid that this is a matter of ſome difficulty, and therefore it was adjourned for farther conſideration. *Ibid.* 418. 2 *Stra.* 909.

Scire fac' for an ill return of a *Fieri fac'*.

Error brought by the ſheriff, upon a judgment againſt him upon a writ of *Scire fac'*, for an ill return of a *Fieri fac'*. 2 *Saund.* 341.

The plaintiff ſhewed, that the ſheriff returned, that his officers had by his warrant ſeiſed goods to the value of 160*l.* and that they were reſcued out of their cuſtody, ſo that he could not levy the debt; and that the ſaid *S.* had no other goods whereupon to levy it, and then the plaintiffs ſuggeſt, that the 160*l.* were not paid to them. Defendant demurred. *Et judic' pro quer'*. And the defendant brought error, that ſuch *Scire fac'* did not lie, but rather debt; and alſo that the ſheriff was not chargeable upon a *Scire fac'*, if he did not return, that he had the money in his hands. *Sed non allocatur.* For the plaintiff upon ſuch return could not ſue out a new execution, unleſs for the ſurplus, and there could be no *Venditioni exponas*; and therefore the plaintiffs ought to have debt or a *Scire fac'*, or otherwiſe they are without remedy, and that by the ſeizure the ſheriff had property, and might receive the goods though out of his office: and judgment was affirmed.

By ſeiſure the ſheriff has property.

Action for not returning writ.

If a *Capias* iſſues againſt *J. S.* and the ſheriff doth not make any return upon the ſaid writ, he is a treſpaſſer *ab initio*, and falſe impriſonment lies againſt him. *Compl. Sher.* 174.

Weſtm. 2. *c.* 19.

Before the ſtat. 13 *Edw. ſt.* 1. *c.* 19. regularly, for not returning a writ, the ſheriff was amerced *quouſque, &c.* but for a falſe return, or imbeziling the writ, action lay at Common law. 2 *Inſt.* 151.

Falſe return.

Tarde.

This ſtatute prevents the return of a *Tarde*, *i. e.* *Quod breve adeo tarde venit, quod præceptum regis exequi non potuit.*

Cap' Utlagat'.

It is a queſtion if action on the caſe lies againſt a ſheriff for not returning a *Cap' utlagat'*. It ſeems it does; for the party has loſs by not returning the writ, though the queen may amerce him for his contempt. *Cro. El.* 873.

Action

Action on the caſe lies againſt a ſheriff for not returning a ſummons. *Leon.* 146. Summons.

If a *Capias* be returned out of an inferiour court to an officer of the court to take *J. S.* and he took him accordingly, and does not return the proceſs, he is a treſpaſſer *ab initio*, for as much as he is the officer that ought to return it, and he is a ſheriff within his juriſdiction. 2 *Rol. Abr.* 563. *Cap'* out of inferiour court, and no return.

If a *Capias* in proceſs be awarded to the ſheriff, and he makes his warrant to a bailiff errant, who is a ſworn and known bailiff within the county, to take him, and he does it accordingly, if the ſheriff does not afterwards return this writ, it ſhall make him a *treſpaſſer ab initio*, becauſe he is but the ſheriff's ſervant; and for this he ought to be ſubject to the wrong done to the party, as his maſter is. But if the bailiff errant, in that caſe, return the body and the warrant to the ſheriff, although the ſheriff doth not return the writ, yet he is excuſed. And if the ſheriff upon ſuch proceſs make ſpecial bailiffs, and they take the party, and the ſheriff doth not return the writ; although there is not any default in the bailiffs, yet they are *treſpaſſers ab initio*, becauſe they are but ſervants to the ſheriff, and by his appointment; but this ſeems a ſorry reaſon: and I take it *Cro. Car.* 446, 447. is good law. For tho' the ſheriff ought to return his writ, otherwiſe his juſtification in falſe impriſonment is not good; yet it is not ſo with his ſervant, for he has no means to inforce the ſheriff to make return thereof; and if what he does is legal, it ſhall not be made illegal to him by the act of default of another. *Cro. Car.* 446, 447. Bailiff errant or ſervant not to be puniſhed for the not return of the ſheriff.

Upon a *Capias* in proceſs, if the ſheriff makes his warrant to a bailiff of a *franchiſe* to execute it, who does it accordingly, and makes return of the body and warrant to the ſheriff, and the ſheriff after does return the writ, yet this ſhall not make the ſheriff a treſpaſſer *ab initio*, becauſe he had done his duty, and no default is in him, and he is the officer of the franchiſe, and not of the ſheriff. *Compl. Sher.* 176. Where no default is in the bailiff of a franchiſe, he is excuſed.

The

Sheriff not to file the return, depending action.

The court was moved, that the ſheriff may not be admitted to file the return of a writ, becauſe action on the caſe was depending againſt him for not returning it; becauſe then the action would abate; and it was granted. *Stile* 408.

Laying the action and declaration.

In a writ of *Entry ſur diſſeiſin*, the land lying in the county of *H.* if the plaintiff deliver the writ of ſummons to the ſheriff of *H.* in *London*, and after the ſheriff ſummoned the defendant upon the land, and after doth not return the writ; for which action on the caſe is brought in *London*, where the writ was delivered to him; and the defendant pleads he did not ſummon him, *&c.* upon which they are at iſſue; this may be tried in *London*. 2 *Rol. Abr.* 807.

For not returning the ſummons.

Action on the caſe againſt an under-ſheriff, and declares, whereas the plaintiff had brought a writ of entry againſt *H. C.* and delivered it to the under-ſheriff to be executed *in formâ juris*, and gave him two ſhillings for the executing of it, and that at ſuch a day he cauſed the ſaid *H. C.* to be ſummoned, yet *falſo*, *&c.* he did not return the writ of ſummons at the day of the return. *Cro. El.* 175, 397.

It is not averred, that the officer continued in his office.

It was moved in arreſt of judgment, for that it is not averred he was under-ſheriff, and continued in his office at the day of the return; for otherwiſe the action lies not againſt him. *Sed non allocatur. Leo.* 146.

It ſhall be intended.

It ſhall be intended that he continued in his office, for he was under-ſheriff when the writ was delivered to him; and it is alledged, that he cauſed ſummons to be made, and did not return it at the day, by which it ſhall be intended that the authority was in him. The declaration was, that the ſaid *Aſtrey* (defendant) *intendens & machinans ipſum querentem in actione ſuâ prædict' proſequend' impedire*, *&c.* did not return the ſummons, but ſaith not *tunc exiſten'* under-ſheriff, yet it is good; and if the defendant were not under-ſheriff, the ſame ſhall come in of the other ſide.

Saith not *tunc exiſten'*, *&c.*

Action againſt the ſheriff's executors.

If the ſheriff levies goods, and dies before ſatisfaction to the plaintiff, an action of debt will lie againſt his executors. But where the ſheriff is charge-

able

able in his life-time for a ſpecial *Tort* or *Miſfeazance*, there his perſon is only chargeable; and *actio moritur cum perſona*. *Cro. Car.* 539.

At Common law, when the ſheriff made a falſe return upon a writ, an action might be brought againſt him for this falſity; and in this action the ſheriff's return might be traverſed. *Jenk. Cent.* 143. *pl.* 98. and the reaſon why an averment did not lie againſt the ſheriff's return at Common law is, that he is a ſworn officer to whom the law gives credit. *Id. ib.* Concerning traverſes, averments, and againſt returns.

Error becauſe the defendant was not ſummoned in a *Præcipe quod reddat*, at the church door, according to the ſtat. 31 *Eliz. c.* 3. and by reaſon of the default a *Grand cape* was awarded, and the ſheriff returned him ſummoned at the church door.

Court: He ſhall not have this averment, but his action of *Deceit* againſt the ſheriff. *Cro. Eliz.* 9, 10, 371. *pl.* 14, 397. *Mo.* 349. *pl.* 467. *Goldſb.* 128. *pl.* 22. If in partition the ſheriff return, he was there in proper perſon, and this return be received, and the writ filed, then the court cannot examine it; for the return is good, and the party can have no averment againſt the return, nor error. The jury appeared on a trial, and the defendant would have challenged the array *ore tenus*, becauſe it was returned by one *S.* —— Sheriff two days after he had received a writ of *Diſcharge*. *Court*: He cannot challenge it for that cauſe; becauſe it would be a direct averment againſt the record, for it was returned by him as ſheriff, and the return accepted. *Cro. Eliz.* 369. Action *ſur deceipt*, but not on an averment.

The *King's Bench* would ſuffer a traverſe to a ſheriff's return, becauſe it is falſe. And in the *Common Bench* it is uſual, and precedents ordered to be ſearched. 19 *Vin. Abr.* 200. *pl.* 28. in notes. Traverſe allowed.

Sed diſtinguendum eſt. And I ſhall ſhew in what caſes one may aver againſt the return of the ſheriff. Averment.

A man may aver againſt the return of the ſheriff, if the return be a matter collateral. Matter collateral.

As

Reſcous. As if the ſheriff upon a *Capias* return a *Reſcous*, there may be an averment againſt it. *Owen* 132.

In another action. Averment may be againſt the return of the ſheriff, though not in the ſame action; for falſe return. *Winch.* 100.

Return concerns a man's inheritance. If the return of the ſheriff concern my inheritance, I ſhall have averment againſt it. 2 *Rol. Rep.* 54.

Præcipe qd' reddat. In a *Præcipe quod reddat*, at the ſummons returned, he may ſay that his name is *T. B.* and that he was ſummoned by the name of *J. B.* becauſe otherwiſe he ſhall loſe his land by default. 19 *H.* 6. 10. *b.*

In outlawry for felony. If the ſheriff return a man outlawed of felony, he may aver againſt this return, that he came in at the fifth county, and tendred ſureties, and ſo was outlawed; for this is in caſe of life and member. 1 *Ed.* 3. 24. *b.* *Jenk. Cent.* 122. *pl.* 47. *Dy.* 223. This caſe was denied to be law. 12 *Mod.* 424.

Tertenants. On *Scire fac'* againſt the tertenants, the defendant, after the return of the ſheriff, pleads, that he is not tenant. The plaintiff demurs, becauſe, as *Cro. El.* 872. he is eſtopped by the ſheriff's return. And in *Raſtal's Entries*, tertenancy is traverſed as to reſcue.

Waſte. And *Cro. El.* 859. it is agreed, That waſte is traverſable on the return of the ſheriff. But *per Cur'*; A general *Non-tenure* by leſſee for years is pleadable; for elſe his poſſeſſion would be diſturbed by *Ejectment*. *Cro. El.* 872. *Co. Ent.* 620, 622, 3, 4. *Cro. El.* 859. 3 *Keb. Rep.* 170. *pl.* 6.

Diverſity between a general *Non-tenure*, and a ſpecial *Non tenure*, pleaded. So by *Windham:* In ſome caſes one may plead and aver againſt the return of the ſheriff, as to a *Scire facias* that there were other tertenants not named, for he is not omniſcient. And though the ſheriff return that ſuch are tertenants, yet that ſhall not conclude the defendant, but that he may ſay another is tertenant of parcel, who is not warned. But *Rol.* is expreſs, that *Non-tenure* cannot be pleaded in error againſt the return of the ſheriff. *Keb. Rep.* 55. *Cro. Jac.* 50. 2 *Rol. Rep.* 202.

Waſte. View. In waſte, if the officer return, that the jury had the view; yet if the contrary appear by examination

tion at the trial, the return ſhall not conclude any of the parties. 2 *Saund.* 255.

Though a man may not aver contrary to the ſheriff's return; yet he may ſay, he who had indorſed his name on the back ſide of the writ was not ſheriff; becauſe by the Common law, until ſtat. of *Ed.* 2. *c.* no ſheriff or officer uſed to put their names to the returns; and this averment, that he that made the return is no true officer, is not taken away by the ſtatute. *Yelv.* 34. Averment that he was not ſheriff.

If bailiffs of franchiſes that have returns of writs, make a falſe return, the party ſhall have averment againſt it, as well of too little iſſues as of other things, as well as he ſhall have againſt the ſheriff; but all the puniſhment ſhall be againſt the bailiffs. Averment againſt falſe returns of bailiffs of franchiſes.

The ſheriff returns a *Reſcous* on a meſne proceſs to a writ of *Privilege*, and attachment awarded *Niſi cauſa*. The preignotaries affirmed, that the parties might traverſe the return; but the whole court of opinion to the contrary. *T. J.* 39. Writ of privilege.

Though it appears by *Dy.* 212. *pl.* 36. that ſuch return was allowed in *C. P.* to be traverſed, yet it had not been practiſed of late. 2 *Vent.* 175.

Motion to traverſe ſheriff's return of a reſcue, denied by *Holt* C. J. who ſaid, he had indeed known it allowed in one caſe; but there are many authorities, and the conſtant practice to the contrary. *Comb.* 295.

The diſtinction herein laid down in variety of books and caſes is, that on a reſcue on meſne proceſs the ſheriff may return the reſcue, and is ſubject to no action; for that on a meſne proceſs he was not (*a*) obliged to raiſe the *Poſſe Comitatus*, nor would it be convenient ſo to do on the execution of every meſne proceſs. *Cro. Eliz.* 868. *March* 1. *W. Jo.* 201. 3 *Bulſt.* 198. *Rol. Rep.* 389. *Mo.* 852. 2 *Lev.* 144. 6 *Mod.* 141. *Lutw.* 130, 131. Return of reſcue on mean proceſs and on execution.

(*a*) But the ſheriff may, if he pleaſes, take the *Poſſe* to arreſt one on mean proceſs. *Noy Rep.* 40.

But if the ſheriff takes a man upon an execution, as upon (*a*) a *Capias ad ſatisfaciend'*, and he is reſcued from him before he can bring him to priſon, though he returns the reſcue, yet this ſhall not excuſe him; for when judgment is paſſed, and he and his bail do not ſurrender him, nor pay the condemnation money, and then a *Capias* iſſues, to which there can be no bail, there it is preſumed that he will not be forthcoming, becauſe neither he nor his bail have ſatisfied the judgment, and therefore the ſheriff ought to take the *Poſſe Comitatus*; and conſequently it cannot be a good return, that he took the body, but that it was reſcued; and the party may have an action of eſcape againſt the ſheriff on this return; and this is provided by the ſtatute 13 *Edw. ſt.* 1. *cap.* 39. which was made to prevent ſheriffs from returning reſcuers to the king's writs. *Cro. Jac.* 419. *Rol. Rep.* 388, 440. 3 *Bulſt.* 198. *Mo.* 852.

In an action on the caſe againſt the ſheriff for an eſcape upon meſne proceſs, the defendant pleaded a reſcue, which on demurrer was held a good plea, though he did not ſhew that the reſcue was returned. 3 *Lev.* 46.

But if one taken on meſne proceſs be once in priſon, the ſheriff cannot return a reſcous, for the law preſumes that he hath (*b*) power to keep him there. *Rol. Rep.* 441. 3 *Bulſt.* 198. *Cro. Jac.* 419.

If a felon be attaint, and in (*c*) carrying him to execution he is reſcued from the ſheriff, the ſheriff is

(*a*) Or upon a *Capias utlagatum* after judgment. *Cro. Jac.* 419. *Rol. Rep.* 389.

(*b*) But if the priſon is broke by the king's enemies, this ſhall excuſe the ſheriff; 4 *Co.* 84. *Vent.* 239. but not if broke by rebels and traitors, for the ſheriff or gaoler hath his remedy over againſt them. 4 *Co.* 84. *Cro. Eliz.* 815. 2 *Mod* 28. *Vent.* 239.

(*c*) "If any perſon ſhall by force *reſcue* or attempt to *reſcue* any perſon convicted of murder going to execution or during execution, he ſhall be deemed guilty of felony, and ſhall ſuffer death without benefit of clergy." Stat. 25 *Geo.* 2. *c.* 37. *ſ.* 9.

"If

is punishable notwithstanding the rescue; for there is judgment given, and the sheriff should have taken sufficient power with him; and therefore in that case the township is not finable. *H. H. P. C.* 602. and there said that a rescue is no excuse in felony.

It hath been adjudged, that the return of a rescue by a sheriff must shew the year and day on which it was made, such return being in lieu of an indictment. 3 *H.* 7. 11. *pl.* 3. *Bro. Abr.* tit. *Return de brief* 97. *Fitz. Abr.* tit. *Coro.* 45. *Attach.* 1. Return quashed.

But it hath been held, that the sheriff's return of a rescue on a *Latitat*, without mentioning the day of the caption, was sufficient; all the clerks in court affirming the precedents to have been so. *Palm.* 532.

The sheriff's return of a rescue, without mentioning the place where it was made, was held naught, and the party discharged. *Mo.* 422. *pl.* 585.

So where, upon a *Latitat* awarded against *J. S.* the sheriff returned a rescous on such a day, but did not mention any place where the rescous was made; and adjudged a void return, because it doth not appear that either the arrest or rescous were within his jurisdiction; but if it had appeared to have been done in the county, it should be intended within his bailiwick though it was within a liberty in the same county; and even in such case the rescous had been lawful, because the arrest was good, nobody being

" If any person after execution shall by force *rescue*, or attempt to *rescue*, the body of such offender out of the custody of the sheriff, or his officers, during the conveyance of such body to any of the places hereby directed, or from the company of surgeons, or their servants, or from the house of any surgeon, where the same is deposited; every person so offending, shall be deemed guilty of felony, and be liable to be transported to some of his majesty's colonies in *America*, for seven years, and be subject to the like punishment and conviction, in case of returning into *Great Britain* within the said seven years, as other felons." *Ibid. s.* 10.

prejudiced

prejudiced thereby but the lord of the liberty. *Yelv.* 51.

But where the return of a reſcous recited that a *Latitat* was directed to him, *&c.* and that he made his warrant to his bailiffs, who arreſted *A.* and that he was reſcued by *J. S.* this was held good, though it did not ſhew the time or place where the reſcue was made. 2 *Rol. Rep.* 255.

Upon reading the ſheriff's return of a reſcous, theſe exceptions were taken to it; firſt, It is ſaid *Feci Warrantum meum Thomæ Taylor*, and doth not ſay that *Thomas Taylor* was his bailiff. Secondly, He doth not ſay for what cauſe he made his warrant, and ſo it appears not whether it was lawful or not; and upon theſe exceptions it was quaſhed. *Stil. Rep.* 155.

Exception to a ſheriff's return of a reſcue, that it was not alledged that the party was in cuſtody, it being only by implication that he was reſcued out of the bailiff's cuſtody; and for this it was quaſhed; ſo that it was not returned who reſcued, or that the party reſcued himſelf. *Sid.* 332. *Lev.* 214.

The ſheriff returned a reſcous on a ſpecial bailiff, *viz.* that *Cook* and ſeven others made an aſſault on the bailiff, *&c.* and the party arreſted *cepit & abduxit*, when it ought to have been *ceperunt et abduxerunt*; and the court held the return good as to *Cook*, but void as to the others; and he was admitted to make his fine by (*a*) attorney, which was 6*s.* 8*d.* *Lit. Rep.* 2.

A reſcue of a perſon arreſted on meſne proceſs was returned againſt divers particularly named, and the return was that they *reſcuſſerunt*, without ſaying *et quilibet eorum reſcuſſit*; and held well enough, it being in the affirmative. *Vent.* 2. 2 *Keb. Rep.* 436.

(*a*) An indictment of a reſcous returned againſt one into *B. R.* ought not be quaſhed, although it be erroneous, except the party that is indicted for it do appear perſonally in court, for he cannot in ſuch caſe appear by attorney, becauſe the offence was criminal and perſonal, for which he muſt anſwer in perſon. 2 *Lil. Abr.* 573.

Exceptions

Exceptions taken to the return that it was *Feci Warrant'*, without saying, *Sub ſigillo officii*, but overruled, for it cannot be a warrant unleſs it be under ſeal, and the ſaying, *Feci warrant' direct'*, implies it was ſo. *T. Jon.* 197.

The ſheriff returned a reſcous thus; Firſt, *Non eſt inventus in ball' mea*, and *Executio reſidui brevis patet in ſchedula huic brevi annex'*, and that was of a taking and reſcous; and the return of the reſcous was quaſhed for the repugnancy; for *per Cur.* after *Non eſt inventus* all the reſt is idle, and there remains no more for the ſheriff to do. But note; Upon the return of a reſcous the ſheriff always concludes, that after the reſcous made the defendant *Non eſt invent. in balliva.* 6 *Mod.* 220. Repugnant.

The return of a reſcue was, that the party was in cuſtody of three of the bailiffs, and that the defendants *inſultum fecerunt* upon one, which the ſheriff called *Ballivos meos*; and for that reaſon it was quaſhed. 5 *Mod.* 218.

It hath been a great queſtion, and much debated in variety of caſes, whether upon a reſcue of a perſon out of the cuſtody of a ſheriff's bailiff, the ſheriff is to return the reſcue *ſecundum veritatem facti*, or *ſecundum veritatem in lege*, that is, that he was reſcued out of the cuſtody of the bailiff, being the truth in fact, or out of his own cuſtody, being the truth in law; the bailiff's cuſtody being in law the cuſtody of the ſheriff himſelf; and it ſeems now agreed, that either return either way is good; and herein ſome books diſtinguiſh between a bailiff of a (*a*) liberty and a common bailiff, and ſay that the return of a reſcue out of the cuſtody of a bailiff of a liberty ought to be ſo expreſſed, becauſe he is ſuch a public officer of whom the court takes notice. Others diſtinguiſh between an action on the caſe and an indictment for a reſcous, for that in the firſt the plaintiff muſt declare as the truth is, *viz.* that he was reſcued being in the cuſtody of the bailiff, but that in an in-

(*a*) 2 *Rol. Rep.* 263. *Stil. Rep.* 417. *Lev.* 214.
(*b*) *Cro. Jac.* 242. *T. Raym.* 161. 5 *Mod.* 217.

dictment it muſt be according to the operation it hath in law. *Palm.* 532. *T. Jon.* 197. *Cro. Eliz.* 780. *Lev.* 214. 2 *Lev.* 28. *T. Raym.* 161. 4 *Mod.* 293. 5 *Mod.* 217. *Sid.* 332. *Stil. Rep.* 417.

Return of reſcue of a man in cuſtody of the ſheriff out of the cuſtody of the bailiffs, repugnant and quaſhed.

Motion to quaſh the return of a reſcue, which was, *Virtute brevis mihi directi feci* a warrant to *J. S.* and *J. N.* my bailiffs, who by virtue thereof *ceperunt et arreſtaverunt* the defendant, *et in cuſtodia mea habuerunt, quouſque* A. and B. *reſcuſſerunt* the defendant *ex cuſtodia* J. S. *et* J. N. *ballivorum meorum*; and it was quaſhed. For by *Holt* Chief Juſtice, the ſheriff ſhould either have returned, that the defendant was in his cuſtody, and reſcued out of his cuſtody, or that he was in cuſtody of the bailiffs and reſcued out of their cuſtody, either of which returns had been good. But this return is repugnant, viz. that the defendant was in cuſtody of the ſheriff, and reſcued out of the cuſtody of the bailiffs. *Ex relatione m'ri Jacob.* Ld. *Raym.* 589. 2 *Salk.* 586.

Return of reſcue.

A return of a reſcue, and four exceptions taken to it.

Firſt, That it ſaid the bailiff by virtue of the warrant took the defendants, and arreſted them, when by law it is the arreſt of the ſheriff; but it was over-ruled *per Cur'*.

Second; Not ſaid that the defendants, who were man and wife, were in the poſſeſſion of the bailiff, but ſaid only that the bailiff took and arreſted them, and being ſo arreſted and being in my cuſtody they were reſcued out of my cuſtody; this was held ill *per Cur'*, for that *exiſtentes in cuſtodia* was an affirmance.

Third; Objected, that in the return it is ſaid that *Parker* and *Mary* his wife *non ſunt inventi in balliva meâ*, but do not ſay *quod uterque eorum' non eſt inventus*, and for this cauſe the return was quaſhed; for though it was urged that this part of the return did not concern the party injured; who was the plaintiff, *per Cur'*, We muſt judge upon the whole return, and this is an excuſe returned why he did not execute this writ; and the excuſe is not compleat,

Stra. 225.

he might not be able to find the wife, and yet might find the husband, and the difference is between an affirmative and a negative in the nature of the thing; if you affirm of many you affirm of each, but it is the contrary in negatives.

Fourth; That it is not said *Vi & armis* they reſcued, but only *Vi & armis* to the aſſault; and for this I held the return naught, *ſilentibus* the reſt of the court. To ſupport the firſt reſolution, the caſe of *The King* and *Maſcal Cooks* was quoted, which confirmed my opinion alſo as to the *Vi & armis*. *Forteſc. Rep.* 362.

Whether ſheriff's return of reſcue be traverſable.

It ſeems that antiently, when the ſheriff returned reſcue, the party was admitted to plead to it as to an indictment; but the courſe of late has been not to admit any plea to it, but drive the party to his action againſt the ſheriff in caſe the return was falſe; and hence it is now ſettled that the return of a reſcue is not traverſable, [*Supl. to Lil. Abr.* 33. *Barnes* 307.] but yet it hath been held that the ſubmiſſion to the fine doth not conclude the party grieved from bringing his action for the falſe return, if it were ſo. *Cro. Eliz.* 781. *Dy.* 212. *T. Jo.* 39. *Ventr.* 224. *Ventr.* 175. *Comb.* 295.

Reſcous returned.

The ſheriff upon a *Capias* returned, that he arreſted the defendant at *S.* and would have carried him to the gaol, and *A. B.* reſcued him. This return was inſufficient, becauſe he did not ſhew at what place *A. B.* made the reſcue; for it ſhould not be intended the place where the arreſt was. *Bro. Abr. tit. Retorn de brief, pl.* 97. *Id. tit. Lieu, pl.* 57. *tit. 69. pl.* 29. *Mo.* 422. *pl.* 585. *Palm.* 563. Upon a *Latitat* awarded againſt *W.* the ſheriff returned a reſcous on ſuch a day, but mentioned no place where the reſcous was; and adjudged void, becauſe *non conſtat*, whether the arreſt and reſcous were within his county and juriſdiction; but if it had *appeared to be done in the county*, though he does *not ſay (infra balliwam meam)* it ſhall be intended within his bailiwick, though it was within a liberty in the ſame county; and even in ſuch caſe the reſcous had been unlawful; becauſe the arreſt was good and no

offence, unleſs to the lord of the liberty. *Yelv.* 51, 52. cites 11 *H.* 4. 2. 14 *H.* 6. *Quare Impedit. Jenk.* 125. *pl.* 53. *S. P.* that the return is void; becauſe it cannot be traverſed for want of a place, out of which the jury ſhall come.

Return of *Devaſtavit*. Sheriff concluded to make return contrary to the verdict.

The defendant pleads *Plene adminiſtravit*, and verdict is for the plaintiff. This eſtops the ſheriff of the county where the trial was, to return *Nulla bona*, for he is concluded by the verdict to make any return contrary to it; but the ſheriff of another county ſhall not be ſo concluded, but the ſheriff of the county where the writ is brought ought to return a *Devaſtavit*, and thereupon the plaintiff ſhall have proceſs into another county. 2 *Leon. pl.* 90. *Anderſ.* 32.

Teſtatum.

And the queſtion further was, if a *Teſtatum* ſhall iſſue into another county, before the ſheriff of the county where the writ was brought had returned a *Devaſtavit*, and not reſolved; but without doubt it is the ſafer way to do it upon the return.

Debt found aſſigned to the queen.

The principal caſe was; debt in *London* againſt an executor, upon *Plene adminiſtravit* it was found for the plaintiff. The plaintiff aſſigned the ſame to the *Queen*, and a *Scire fac'* iſſued out of the *Exchequer* againſt the defendant, *&c.* into the county of *D.* and the ſheriff returned *Nulla bona*, *&c.* which was not good, *cauſa qua ſupra*, though the debt was well aſſigned. And upon a *conſtat* of goods in another county, he may well have a *Scire fac'* into another county. 2 *Leon. pl.* 90. *Bendl.* 23.

Aſſets found and returned *Quod nihil in com'*.

But where executors plead *Plene adminiſtrav'*, and was found they had aſſets, and a *Fieri fac'* iſſued to the ſheriff, who returned that they had not any thing within the county. *Per Cur'*: It is a good return, becauſe the jury, it may be, found aſſets in another county; ſo the verdict ſhall not bind the ſheriff. 2 *Brownl. Rep.* 116.

When the ſheriff may return *Devaſtavit*.

If it appear by the defendant's plea that he has aſſets in his hands, and if the ſheriff cannot levy the debt in the defendant's hands, he may upon the defendant's own ſhewing (without any damage) return a *Devaſtavit*; and if judgment be given againſt the execu-

executor on demurrer, and execution awarded, the ſheriff cannot return *Nulla habet bona teſtatoris.* But it is a *Devaſtavit* if it be found againſt the executor by verdict. *Cro. Eliz.* 102.

Judgment was given in *Banco de bonis teſtatoris,* and *Fieri fac'* iſſues out; the ſheriff returns *Nulla bona*; the plaintiff may have a ſpecial *Fieri fac'*, that the ſheriff ſhall levy the debt of the goods of the dead, and *ſi ſibi conſtare poterit*, that the executors have waſted them, then *de bonis propriis*; and if the ſheriff makes a falſe return, the party may have an action on the caſe. But if upon the return of *Nulla bona*, and a *Quia teſtatum eſt*, that they have waſted, a writ of inquiry is awarded what goods were waſted, and it is found that goods *ad valentiam* of the debt were waſted, and upon that *Scire fac'* to have execution *de bonis propriis* upon two *Nichils* returned; this is erroneous, and if the inquiſition be falſe, the party hath no remedy; and upon two *Nichils* returned, the defendant ſhall be condemned: yet perhaps he had not notice. 5 *Co.* 32.

Special *Scire fac'*.

Faux return and action lies.

To that purpoſe is a caſe in *Lit. Rep.* Judgment was given againſt the executor, and execution awarded; and the plaintiff informs the ſheriff, that the executors have waſted the goods of the teſtator: but the ſheriff would not return a *Devaſtavit*. *Hendon* ſerjeant moved for a commiſſion to inquire whether the goods were waſted; and if it be found, then the ſheriff might return a *Devaſtavit* without peril. But the judges ſaid, they would not adviſe, becauſe it was a new courſe. *Lit. Rep.* 47.

A like caſe.

But in *Aldworth* and *Peel*'s caſe it was reſolved, where debt was brought againſt *Peel* as executor, the plaintiff had judgment to recover *de bonis teſtatoris*; and thereupon a *Scire fac'* was awarded, and the ſheriff returneth, *quod nulla habuit de bonis teſtatonis*: and the plaintiff ſurmiſeth, that he had waſted the teſtator's goods, whereupon he prayed a *ſcire fac'* why he ſhould not have execution *de bonis propriis*. And *per cur'*: This writ ſhall not be awarded upon the ſurmiſe of the party of a devaſtation, nor in any caſe where the judgment is *de bonis propriis*, unleſs it be

Scire fac' de bonis propriis ſhall not be awarded upon the ſurmiſe of the party, but on the return of the ſheriff of a *Devaſtavit*.

on return of the ſheriff, where he returns a *Devaſtavit*. *Cro. Eliz.* 530.

Upon a ſpecial return the huſband charged for the converſion of the wife.

If *A.* recovers againſt *B.* debt and damages, and after *B.* died, and adminiſtration is granted to *C.* his wife, who waſtes the goods, and after takes *D.* to husband, and a *Fieri fac'* is awarded *de bonis teſtatoris* in the hands of *D.* and *C.* and the ſheriff returns *Nulla bona*, &c. and upon this, on ſurmiſe that they have waſted the goods, another writ was awarded to the ſheriff, *ſi ſibi conſtare poterit per inquiſition'*, that they have waſted the goods, then to warn them to ſhew cauſe why execution ſhould not be *de bonis propriis*, and ſo an inquiſition is taken. And the ſheriff returned, that they had not in their hands any of the goods of the inteſtate; but that the *feme*, being adminiſtratrix of her firſt husband, had goods of the value of 100*l.* of the ſaid inteſtate's, and had waſted them during her widowhood, and the huſband had not waſted any of them. *Et ſi devaſtaverint* according to the writ, the jury pray the direction of the court. *Per cur':* This ſpecial return of the ſheriff is good, and by this the husband is to be charged for the converſion of the wife. *Cro. Car.* 600.

Faux return.

The ſheriff returns a *Devaſtavit* (no aſſets over being in queſtion) on *Non eſt factum* againſt an adminiſtrator by *Fieri fac'* with a *Scire fac'*. *Per cur':* Though it be a falſe return, we cannot help it, but it is at the ſheriff's peril. 3 *Keb. Rep.* 530. *pl.* 20.

Traverſe wanting.

On *Fieri fac'* with a *Scire fac'*, and aſſets, the ſheriff returned waſte; and the defendant pleaded *Plene adminiſtravit*. The plaintiff demurred, becauſe the point of the inquiſition is not traverſed; and judgment *pro querente*.

Debt againſt an executor, and a recovery by verdict, and judgment upon this, and a *Fieri fac'* *de bonis* of the inteſtate; upon which a *Devaſtavit* was returned, an *Elegit* iſſues *de bonis propriis*. Mo. 299. pl. 446.

How the party may diſcharge himſelf of a *Devaſtavit* by plea.

If *A.* recover againſt *B.* and execution *de bonis teſtatoris, ſi non, de bonis propriis*, and the ſheriff upon a *Fieri fac'* levies the monies, and after to another

Fieri

Fieri fac' to whom directed, returns a *Devaſtavit*; and upon this a *Scire fac'* is granted againſt *B.* to ſhew cauſe, &c. *B.* may diſcharge himſelf of this *Devaſtavit* by plea, that the ſheriff levied the money upon the firſt *Fieri fac'*. Rol. Abr. 903.

An action was brought againſt a ſheriff for a falſe return of a *Fi. fac.* againſt an adminiſtrator, *de bonis inteſtati*, and on *Non cul'*, verdict for the plaintiff; and a caſe was made for the opinion of the court, *viz.*

Judgment againſt an executor, &c. by confeſſion or default, is an admiſſion of aſſets, and he is eſtopped to ſay the contrary on *Devaſtavit* returned; and ſo is a jury.

The plaintiff being an adminiſtrator, was ſued by *A.* and pending the ſuit, let judgment be againſt him by *B.* but did not plead that judgment in bar of the action, yet ſold the inteſtate's goods to pay *B.* *A.* recovered judgment, and ſued a *Fi. fa.* on which the ſheriff levied part, and as to the reſt returned a *Devaſtavit*.

Argued pro quer. That the ſuffering judgment by default was no confeſſion of aſſets, and that the ſheriff ought not to have returned a *Devaſtavit* on the *Fi. fa.* but a *Nulla bona*, and that thereupon there ought to have been a *Scire fieri* inquiry: But *per curiam*,

Devaſtavit may be returned on a *Fi. fa.* without inquiry.

1. The ſheriff may return a *Devaſtavit* on the firſt *Fieri fa.* if he will; 'tis at his peril, if falſe, and the inquiry is only for his ſafety.

2. If an executor confeſſes, or ſuffers judgment by his default, he admits aſſets, and is eſtopped to ſay the contrary.

3. That he might have pleaded the firſt judgment obtained by *B.* againſt the action of *A. et riens ultra*, but having not done it, he has confeſſed he has aſſets to anſwer the judgment in this as well as the firſt action; and if a *Scire fac' inquir'* had been awarded on the ſaid judgment, and a *Devaſtavit* returned, and *Non devaſtavit* pleaded, the adminiſtrator could not have given in evidence the firſt judgment, becauſe he had not pleaded it when he might, ſo no occaſion for an inquiry; nor is he injured by the return of *Devaſtavit* on the *Fi. fa.* ſince it could not have been avoided, if there had been an inquiry.

4. The adminiſtrator's not pleading the firſt judgment, and *nihil ultra*, when he might, is an admiſſion of aſſets as to the ſecond judgment, ſo that he has ſlipped his time, and he is eſtopped; and ſo are the jury, and their verdict is void, and the ſheriff ſhall take advantage of all eſtoppels between the parties: as if an action be brought againſt a feme ſole, and ſhe marries, and judgment is againſt her as ſole, and execution thereon, and the ſheriff takes her by that name, ſhe is eſtopped to ſay the contrary. *Salk.* 310. *pl.* 14. 2 *Ld. Raym.* 589. See *Dy.* 57, 222. 2 *Sid.* 70.

The modern practice.

But now the practice is more nimble than by the tedious inquiſitions, and that is, by bringing action in the *Debet & detinet* againſt an executor, ſuggeſting a *Devaſtavit* in his declaration, without any return of the ſheriff. *Sid.* 397.

Plea of *Devaſtavit* to *Scire facias.*

Sheriff returns upon inquiſition, that the defendant (adminiſtrator) *habuit bona & catalla in manibus ſuis, quæ fuerunt del inteſtate tempore mortis ſuæ ad valentiam debiti & damnorum* recovered by the original judgment; and that the defendant *bona & catalla illa ad valenc' debiti & damnorum prædict' vendidit & elongavit ac in uſum ſuum proprium convertit & diſpoſuit.* Defendant at the return of the writ comes in, and *proteſtando* that he had fully adminiſtred, for plea he ſaith, *non vendidit ſeu elongavit, &c. et hoc, &c.* Plaintiff replies, that the defendant *vendidit, elongavit, &c.* and found for the plaintiff. *Per cur':* Tho' this is no apparent iſſue, (but whether *Devaſtavit vel non*) for the defendant might pay debts with his proper monies, and that he might diſpoſe of the goods to his own uſe; yet it is good after verdict. For the writ of *Scire fac'* ſuggeſts, that the defendant *bona & catalla, &c. diſpoſuit ea intentione quod dicta executio non fieret.* Saund. 306. And it is the defendant's own fault to take ſuch an iſſue; for he might have taken iſſue, that he had not goods of that value, or that he had paid any ſpecial debt.

CHAP.

CHAP. VIII.

Venire Facias; Habeas Corpora Juratorum; Distringas.

STAT. 8 *H.* 6. *c.* 12. extends to any record, ſpecialty, copy, *&c.* 2. Parol. 3. Plea. 4. Warrant of attorney. 5. Writ original and judicial. 6. Panel. 7. Return. But by it miſpriſion of clerks are only amendable; but it extends not to an inſufficient trial, where the *Venue* is miſtaken. It extends not to a return of a ſheriff, where it ſhould be by a coroner: Nor to a trial by one not returned by the *Venire fac'*. Nor to a return of a *Venire fac'*, without the name of the ſheriff. Now theſe miſpriſions are not remedied by 8 *H.* 6. *c.* 12. 32 *(a) H.* 8. *c.* 30. nor 18 *Eliz. c.* 14. *(viz.)* where the return is by the ſheriff, where it ought to be by the coroner; when the ſheriff does not put his name to the return of the jury; when no return is on the *Venire fac'*; nor when one gives a verdict, who is not returned; nor to inſufficient trials, where the *Venue* is miſtaken. 8 *Co.* 156.

Statutes of *Jeofails.*

Miſpriſions not remedied.

After verdict, judgment ſhall not be arreſted, for that the Venire fac', Hab. corpora, *or* Diſtringas, *was awarded to a wrong officer, upon any inſufficient ſuggeſtion, or that the* Venue *was in ſome part miſawarded, or iſſued out of more or fewer places than it ought to be, ſo as ſome one place be right named.* Or for miſnaming any of the jurors, either in the ſurname, or any addition in any of the writs or returns thereof ſo as *conſtat de perſona.* Or for a want of return of any of the ſaid writs, ſo as a panel be re-

(a) Perpetuated by ſtat. 2 & 3 *Edw.* 6. *chap.* 36.

turned

turned and annexed thereunto. Or for that the officer's name is not ſet to the return." Stat. 21 *Jac. c.* 13.

To what ſtat. *Jeofails* do not extend. See 9 *Ann. c.* 20. *ſ.* 7.

No acts of *Jeofails* extend to appeals or pleas of the crown; nor to actions or informations on penal laws, except in *(a)* 17 *Car.* 2. *c.* 8. other than concerning cuſtoms, ſubſidies of tonage and poundage, to which it extends not. But the ſtat. 21 *Jac.* helps not, if the Chriſtian name of a juror be miſtaken, and the law notwithſtanding. 5 *Co.* 41, 42. and *Cro. Jac.* 458. remains as it was. See 2 *Vin. Abr.* 292. *pl.* 5.

But it is amendable by ſtat. 18 *Eliz.* as a diſcontinuance of proceſs, as *Teppet* on the *Venire*, and *Tippet* on the *Diſtringas* was amended. So *Samuel* in the *Venire*, and *Daniel* in the *Nomina Juratorum*.

If no *Venue*.

If there be no *Venue*, it's aided by 16 & 17 *Car.* 2. after a verdict, if the cauſe be tried in the proper county where the action is laid. 2 *Saund.* 227.

To what judgments the ſtatutes of *Jeofails* ſhall be extended.

All the ſtatutes of *Jeofails* ſhall be extended to judgments by confeſſion, *nil dicit*, or *non ſum informatus* in any court of record, and no ſuch judgment ſhall be reverſed, nor any writ of inquiry of damages executed thereon, be ſtayed or reverſed, for or by reaſon of any imperfection, omiſſion, defect, matter, or thing whatſoever, which would have been aided and cured by any of the ſaid ſtatutes of *Jeofails*, in caſe a verdict of 12 men had been given in the ſaid action or ſuit, ſo as there be an original writ or bill, and warrants of attorney duly filed according to the law as it is now uſed, *&c.*" Stat. 4 *Ann. c.* 16. *ſect.*

To prevent challenges to the arrays of panels upon *Venire's*.

And whereas great delays do frequently happen in trials, by reaſon of the challenges to the arrays of panels of jurors, and to the polls, for default of huntdredors; for prevention whereof, 'tis "enacted, that every *Venire facias* for the trial of any iſſue, in any action or ſuit in any of her Majeſty's courts of record at *Weſtminſter*, ſhall be awarded of the body

(a) Perpetuated by 1 *Jac.* 2. *c.* 17. *ſect.* 5.

of the proper county where ſuch iſſue is triable."
24 *Geo.* 2. *c.* 18. *ſect.* 3.

But 4 *Ann.* not to extend to appeals, indictments, preſentments; or to any writ, bill, action, or information, upon any penal ſtatute. Not to extend to appeals, &c.

Yet this act, and all the ſtatutes of *Jeofails*, to extend to all ſuits in any of the courts of record at *Weſtminſter*, for recovery of any debt immediately owing, or any revenue belonging to her Majeſty, her heirs or ſucceſſors; and ſhall alſo extend to all courts of record in the counties palatine of *Lancaſter*, *Cheſter*, *Durham*, and the principality of *Wales*, and to all other courts of record within this kingdom. To extend to counties palatine, and all courts of record.

"Jurors to ſerve upon the *Tales* ſhall be freeholders or copyholders of the county, and returned upon ſome other panel to ſerve at the ſaid aſſizes, and attending in court, and may be challenged by plaintiff or defendant. Demandant or tenant is, if they had been impanelled upon a *Venire facias*, to try the iſſue. Stat. 7 & 8 *W.* 3. *c.* 32. *ſect.* 3. *Tales* men. Challenge.

By 4 *Ann. c.* 16. *ſect.* 8. when a view of meſſuages, lands or places in queſtion, ſhall be thought neceſſary by the court, for the jurors better underſtanding the evidences that will be given upon the trials of ſuch iſſues, in every ſuch caſe the reſpective courts in which ſuch actions ſhall be depending, may order ſpecial writs of *Diſtringas*, or *Habeas Corpora*, to iſſue. By which the ſheriff, or ſuch other officer to whom the ſaid writs ſhall be directed, ſhall be commanded to have ſix out of the firſt twelve of the jurors named in ſuch writs, or ſome greater number of them at the place in queſtion, ſome convenient time before the trial, who then and there ſhall have the matters in queſtion ſhewn to them by two perſons in the ſaid writs named, to be appointed by the court; and the ſaid ſheriff, or other officer, who is to execute the ſaid writs, ſhall, by a ſpecial return upon the ſame, certify that the view hath been had according to the command of the ſaid writ. View. Special *Diſtringas* or *Hab' corp' jur.* View. Special return.

The *Venire* ought to be delivered to the ſheriff four days before the return of it, if the jury dwells forty miles When the *Venire* ought to be delivered to the ſheriff.

miles off; and eight days, if they dwell farther from the place where the trial is to be.

The name of the ſheriff to the *Diſtringas* and *Tales*, are of neceſſity, and to the return of the *Habeas corpora*, by the ſtatute of *York* 12 *Ed.* 2. c. 5. and theſe are not holpen by any of the ſtatutes of *Jeofails*. *Cro. Eliz.* 310. *Cro. Jac.* 188. *Cro. Eliz.* 482, 509.

What return of a *Venire* ſhall be good, and what error amendable.

Inſufficient returns are aided by the ſtatute of *Jeofails*; as upon the return of the *Venire fac'* there wanted theſe words, *Quilibet jurator' per plegios*. This is not as if there was no return at all. And *per cur'*: It's an inſufficient return which is aided, and it was awarded to be amended; for the omiſſion of pledges is but matter of form, and not like where there was a want of an original. And ſo in 2 *Rol. Rep.* 87. the ſheriff returns a *Venire fac'* (viz.) *Executio iſtius brevis, &c.* and the panel of the jurors is filed to it; but under the names of the jurors he omitted to file the pledges. *Cro. Jac.* 2 *Rol. Rep.* 87.

Omiſſion of pledges.

Vicecomiti omitted.

In the writ of *Venire fac'* awarded to the ſheriff of *Somerſet*, the word *(Vicecomiti)* was omitted; yet he returned the panel, and his name was indorſed. *Per cur'*: It is error: but becauſe upon the roll it was *Vic' Somerſet*, it was amended. *Cro. Car.* 595.

Album breve.

Venire fac' was *album breve*, (i. e.) no name of the ſheriff was indorſed. It was denied to be amended. *Brownl.* 43.

The return of a *Venire* by one ſheriff of *London* is ill, and not helped by the ſtatute 21 *Jac.* But a *Certiorari coronatoribus*, where there is but one, is well enough. *Keb. Rep.* 867. *pl.* 14. *Sid.* 243. *pl.* 5. *Keb. Rep.* 900. *pl.* 71. 901. *pl.* 75.

Variance.

Venire facias was awarded in the time of Queen *Elizabeth*, and a *Diſtringas* with *Niſi prius* in the time of King *James*, reciting *quod diſtringat juratores nuper ſummonit' in curia noſtra*, whereas in truth there had not been any ſummons *in curia* of the King, but of the Queen only, and trial and judgment thereupon; and it was reverſed for this error: for this *Diſtringas* with *Niſi prius* is a ſpecial authority to the juſtices,

Diſtringas niſi prius.

juſtices, who being juſtices by the ſpecial commiſſion, and not having authority to take any jury but ſuch as was ſummoned *in curia regis*, there being none ſuch, the trial by the jury was erroneous. *Cro. Jac.* 161. But in the principal caſe, which was error of a judgment in *Durham*, ſuch caſe was amended; becauſe the juſtices of *Durham* are original judges of the whole record, and had the record before them at the time of the trial, and the writ being variant, might be amended there. *Cro. Jac.* 161.

Amendment in *Durham*, and why.

The *Venire* was between *Heath* and *J. T.* and the ſheriff returned it to be between *Heath* and *W. T.* This was a miſ-trial, and judgment ſhall not be for the plaintiff. *Winch* 73.

W. T. for *J. T.* miſ-trial.

Venire fac' bears *Teſte* on a *Sunday*; it was amended after trial. 6 *Mod.* 286.

Teſte Sunday.

A *Venire fac'* bore *Teſte* out of term, and made to accord with the roll; and a *Diſtringas* was amended a long time after the trial: yet the roll being good, it was amended. *Cro. Jac.* 161.

Amendment by the roll.

Venire awarded *vicecomitibus* Lond' *Præcipimus ſibi*, was amended after verdict. So if after the *Habeas ibi hoc breve*, if the *Nomina juratorʳ* be left out. *Cro. Eliz.* 543.

Præcipimus ſibi.

In the award of a *Venire fac'* ſuper *quo præceptum fuit vicecomiti com'*, &c. it is error; it ought to have been *Præceptum eſt.* 2 *Saund.* 393.

Præceptum eſt.

The *Niſi prius* roll is, that challenge being made to the ſheriff after iſſue, and confeſſed, a *Venire fac'* was awarded to the *coroners*; but the roll of *Niſi prius* was, that the *Venire fac'* was awarded to the ſheriff. *Per Cur':* This roll of *Niſi prius* being a miſpriſion, and which ought to be warranted by the record, ought to be amended. *Cro. Jac.* 353. *Winch Rep.* 73.

Amendment *ſur challenge.*

If the ſheriff return, that there are no freeholders of the *Viſne*, or if the *Viſne* be where the King's writ runs not; as in the *cinque ports*, &c. or in a place where the men are privileged from ſerving on juries out of that place, as the *iſland* of *Ely*, &c. the plaintiff may pray a *Venire fac'* of the *Viſne* next adjoining;

Where a *Venire fac'* ſhall be of the *Viſne* next adjoining.

ing; and if the *Viſne* be in *Wales*, (where the King's writ runs not) the *Venire fac'* ſhall be directed to the ſheriff of the next *Engliſh* county, to cauſe the jury to come *de propinquiore Viſne* of his county to the *Viſne* in *Wales* adjoining; for the court ſhall not be ouſted of the plea.

Words left out. If the words (*quorum quilibet habeat*) be left out, or *duodecim*, or *qui nulla affinitate attingunt*; theſe are amendable, as miſtakes of the clerks.

County omitted. *Venire fac'* was in this manner: *Jacob'*, &c. *Vicecomiti ſalutem*, and ſaith not of what county, it was amended. *Cro. Jac.* 78.

Error. *Venire fac'* was returnable *coram majore & ballivis de Exeter*, without ſaying *in curia vel hic.* It is error, becauſe it may be returned in a tavern. *Sid.* 77.

Venire fac' quaſhed. If a *Venire fac'* be quaſhed for conſanguinity to the ſheriff, a *Venire fac' de novo* ſhall be granted to the coroners. 2 *Rol. Abr.* 720.

Venire fac' de novo. The awarding of a new *Venire fac'* to the ſheriff, where the *Venire fac'* was quaſhed for favour in the under-ſheriff, is not error. *Rol. Rep.* 272.

Ven' fac' to a wrong officer. A *Venire fac'* is to the coroners without any ſuggeſtion at all of any challenge to the ſheriff. This is not aided by 21 *Jac. c.* 13. nor by the 16 & 17 *Car.* 2. *c.* 8. and the court cannot amend this direction of proceſs to a wrong officer; and the court cannot examine the truth without a ſuggeſtion. And judgment was arreſted. 3 *Keb. Rep.* 624. *pl.* 4.

Judgment arreſted.

Error. *Venire* awarded to the coroners, and *Tales* to the ſheriff is erroneous. *Cro. Eliz.* 574.

Coroners. If a *Venire fac'* be directed to the coroners, all the coroners ought to join in the return; and ſo both the ſheriffs of *London* ought to join, or elſe the return is not good. *Hob.* 97.

Error.

4 *Mod.* 65. *Sal.* 152. *Carth.* 214. *Comb.* 191. Where there are two ſheriffs, and one is challenged, the *Venire* muſt go to the other, and not to the coroner. Information againſt defendant for a riot in *Cheſter*, which is a county palatine, and therefore to be tried there; and a ſuggeſtion being entered on the roll, that the ſheriff was of affinity with the defendant, the *Venire fac'* iſſued to the other ſheriff

If ſheriff dies, no proceſs ſhall iſſue till another be made; and proceſs ſhall not go to the coroner.

only,

nly, and a jury returned; and defendant found not uilty, and the record removed thither. And moved n arreſt of judgment, that the *Venire* was ill directed, or it ought to have been to the coroners. But *cur'*, *Holt* delivering it, the *Venire* is well, and trial good; nd ſo adjudged before between Sir *D. Rich* and Sir *Thomas Player*, where the *Venire* was directed to Sir *D. North* only, the other being a party. For the heriff is the proper officer to whom the return of writs belongs; and the law does not commit it to others, without default or partiality ſuſpected, and hen conſtitutes the coroner; but where there are wo ſheriffs, and only one of them ſuſpected of parſiality, and for this defect is challenged, his companion is as proper a perſon to ſupply that defect as he coroner. But it is ſaid, both ſheriffs make but ne officer, yet every one of them is a ſheriff; the coroners are but one officer, *Mod.* 198. yet if there e two coroners, and one of them be challenged, and f four, and three be challenged, the *Venire* ſhall go to the other; but if none, it is directed to go o them all: ſo *Venire* is not to be directed to the coroners, but on default of ſheriffs. If ſheriff dies, proceſs does not iſſue till another be made, and ſhall not go to the coroners. It is the challenge only makes he coroners or any of them officers; and why may not the challenge as well make the other ſheriff an officer? In a *Quare impedit* againſt the archbiſhop of *York*, if he be found diſturber, the writ *De admittenda idonea perſona* goes to the archbiſhop of *Canterbury*; yet he has not ſuperiority, but only precedency. *Dy.* 327. And *Venire* well awarded. 12 *Mod.* 22.

The ſheriff need not return the names of all the 24 on the *Diſtringas*, *Hab' corpora*, or *Venire fac'*, nor affix them to the ſaid writs. *Keb. Rep.* 418. *pl.* 131. All the names.

And it was agreed *per cur'*, 2 *Rol. Rep.* 111. becauſe the *Venire fac'* was good and well returned, the *Diſtringas* ſhall be awarded by the ſheriff. *Diſtringas* awarded *per le vic'*.

If a *Diſtringas ſicut alias* iſſue againſt the jury, and no other *Diſtringas* was awarded againſt them before, *Diſtringas.*

before, by which the proposal of the writ is false; yet this is not error, for the *Venire fac'* serves instead of a *Distrigas*. 2 *Rol. Rep.* 133.

Hab' Cor'. The panel of the *Hab' corpora* was amended upon the sheriff's oath. And where the *Distringas* was blank, yet the *Venire fac'* was well returned. *Cro. Jac.* 483.

Contrary *Distringas.* A contrary *Distringas* is by the sheriff put to the right *panel*, and tried; the trial was held good, so though no *Distringas* had been; for as this is, there is no writ between the parties. 3 *Bulstr.* 180.

Upon an information, the *Distringas* was tested the day after the return of the *Venire facias*, and held not amendable. *Salk.* 51. 6 *Mod.* 164, 268. 2 *Raym.* 1061.

Tales. *Tales* not removed by the sheriff or his deputy, or any sworn officer, but by a clerk of the court; but by general appointment of the sheriff it is well enough, and the sheriff is answerable for it. *Keb. Rep.* 357. *pl.* 48. *Sid.* 90. *pl.* 9. *T. Raym.* 240.

Array after, *&c.* *Array* returned by the sheriff, after his discharge, is not good. *Cro. Eliz.* 369.

CHAP. IX.

Juries.

Jurors of two sorts. JURIES to inquire, are grand juries at assizes, or the quarter-sessions. So juries returned before

Grand jurors. justices of peace, to inquire of riots, forcible entries, and juries returned before commissioners of sewers, coroners, *&c.* and inquisitions taken before the sheriff; and all these the sheriff is to summon.

Formerly, upon every trial in personal actions, the sheriff was to return two hundredors at least, *Co. Lit.* 135, 158. but the law in that respect is now altered; for by stat. 4 *Ann. c.* 16. *s.* 6, 7. and 24 *Geo.* 2. *c.* 18. *s.* 3. it is declared not necessary. See the statutes.

If

If it be conceived an indifferent jury will not be returned in the country, the court on motion will order the ſheriff to attend the ſecondary of the office, with the book of his freeholders, to have an indifferent one returned. So it was done, becauſe the plaintiff, in a former trial between the parties, had peaſted four of the jury that were returned upon that trial, 2 *Vin. Abr.* 301. *pl.* 1. and the like was done in *Coxe*'s caſe, 15 & 16 *Car.* 2. *B. R.* becauſe *Coxe*, who was intitled to the reverſion, had forbid rent to be paid by the tenants, and took on him the defence of the *ejectment* brought againſt the tenants, was of kindred to the ſheriff and under-ſheriff, and truſtee for them. But in another caſe, 17 *Car.* 2. *B. R.* the court, on certificate of a judge, that verdict was given contrary to evidence, would not allow that the ſheriff ſhould bring in the book of freeholders to the ſecondary for the ill example; but ordered the ſheriff ſhould return a good jury in the new trial. Jury returned by the ſecondary.

A rule was made, that *when the maſter ſtruck* a jury, *viz.* 48 out of the freeholders book, *he ſhould give notice to the attornies* of both ſides to be preſent; and if *the one came, and the other did not*, he who appeared ſhould, according to the antient courſe, ſtrike out twelve, and the *maſter ſhould ſtrike out* the other twelve *for him that was abſent.* Salk. 405. *pl.* 1.

In ſuch caſe the jury ſhall be ſtruck *ex parte*, and the ſecondary ſhall ſtrike twelve for him that does not attend. 12 *Mod.* 94.

Upon motion that the cauſe to be tried at the bar is of great conſequence, the court made a rule for the ſheriff to return 48 jurors upon the jury. 2 *Vin. Abr.* 155. Returned.

If by rule of court the maſter is ordered to *ſtrike the jury*, in caſe it be *not expreſſed* in ſuch rule, *that the maſter ſhall ſtrike* forty-eight, *and each of the parties ſhall ſtrike out* twelve, the maſter is to ſtrike forty-four, and the parties have no liberty to ſtrike any. *Salk.* 405. *pl.* 2.

When a trial is to be for a thing which concerns the under-ſheriff, there the high-ſheriff ſhall return When to return the jury.

the jury; if the trial concerns the high-ſheriff, the under-ſheriff ſhall not return the jury, but the coroners. 2 *Lil. Abr.* 155.

The attorney general moved for leave to amend an *Information* againſt defendant, wherein the name of a commiſſioner of exciſe was miſtaken; and granted; and that the maſter might ſtrike a jury *by conſent*, which was alſo granted, being only a caſe of *Miſdemeanor*, but *not in capital caſes*; for then the priſoner would loſe his challenges, and it was never aſked to replead upon mending the information. 12 *Mod.* 224.

If there be *no legal exception againſt the ſheriff*, the court cannot ſlip him, and order another to ſtrike a ſpecial jury, without *conſent* of the *parties*, to try an iſſue at the aſſizes; but if there is any lawful objection againſt him, and it appears to be ſo upon affidavit made, then a ſpecial jury may be ſtruck by the maſter of the office, without conſent of the parties. But a ſpecial jury may be granted to *try a cauſe at bar*, without conſent of the parties; but never at the *Niſi prius*, unleſs good cauſe ſhewn; by three juſtices, *contra* Ch. J. 8 *Mod.* 245, 248.

Special juries. "His majeſty's courts of *King's Bench*, *Common Pleas* and *Exchequer* at *Weſtminſter*, upon motion made in behalf of his majeſty, or on the motion of any proſecutor or defendant in an indictment or information for any miſdemeanor, or information in the nature of a *Quo Warranto* in the *King's Bench*, or in an information in the *Exchequer*, or on motion of any plaintiff or defendant in any cauſe depending in the ſaid courts, are required to order a jury to be ſtruck before the proper officer for the trial of any iſſue, in ſuch manner as ſpecial juries are uſually ſtruck in ſuch courts upon trial at bar." Stat. 3 Geo. 2. *c.* 25. *ſect.* 15.

"The perſon who ſhall apply for ſuch jury ſhall pay the fees for ſtriking it, and ſhall have no allowance for the ſame on taxation of coſts." *Ibid. ſect.* 16.

For ſpecial juries in the counties palatine. "The juſtices of the ſeſſion or aſſiſes for the counties palatine of *Cheſter*, *Lancaſter* and *Durham*, upon

upon motion on behalf of his majeſty, or of any proſecutor or defendant, in any indictment or information for miſdemeanor, or on the motion of any plaintiff or defendant, may, in caſe they think fit, order a jury to be ſtruck before the proper officer of each court, in ſuch manner as ſpecial juries have been uſually ſtruck in the courts at *Weſtminſter* upon trials at bar." Stat. 6 *Geo.* 2. *c.* 37. *ſ.* 2.

Exemption not for privilege.

The ſheriff ought not to return privilege, to be exempt from juries; but he ought to ſummon, and ſhall not be liable to an action. *Sid.* 243. *pl.* The caſe was, *Venire fac'* was awarded to the ſheriff of the city and county of *Canterbury*, to return a jury here at the bar, and upon the *Diſtringas* the ſheriff returns this to be an ancient city and county, and that the king had granted to them an exemption, not to ſerve in any jury out of their city, except in caſes of high treaſon; and by expreſs words, that they ſhould not ſerve *coram ipſo rege*. *By court*,

Sur Diſtringas, exemption granted by the king.

Ill.

Firſt, The return is ill: becauſe, if it were in the power of the ſheriff to return privilege, he cannot do this upon the *Diſtringas* or *Habeas Corpora*, as he did here; becauſe by the returning of the *Venire*, *viz.* that there are 24 *prob. & legales homines*, he had concluded himſelf, there being alſo pledges upon every ſuch return.

Privilege of exemption, when to be claimed.

Secondly, That the ſheriff may not return ſo at any time, but ought to return them ſummoned, and the parties ought to come here; and then every perſon who had cauſe of privilege ought to claim here in perſon, and not the ſheriff for them. *Mo.* 383. *pl.* *Sid.* 293. *pl.* The court awarded an *Alias Diſtringas*, in regard the ſheriff cannot vary from the firſt *Venire* returned, but muſt have the ſame men. *Keb. Rep.* 867. *pl.* and no action lies againſt the ſheriff upon their delivery of the writ of exemption. *Hard.* 389.

Action on the caſe againſt the ſheriff for returning one exempt.

But in *Rol. Rep.* 119. action on the caſe adjudged does lie againſt the ſheriff, for returning one of a jury, who lived in a place which is exempt; and 4 *Inſt.* *Chap.* 130, 382, 447, 461, 488. action on the caſe

lies againſt the ſheriff, for returning a perſon exempt of a jury.

What jurors the ſheriff muſt return.

The ſheriff muſt not return *magis remotos, minus ſufficientes, & magis ſuſpectos*, by the ſtatute 13 *Edw. ſtat.* 1. *c.* 38. and if he do, the plaintiff or demandant ſhall recover damages by the ſtatute, if he be delayed, and the defendant if he loſe his land, and 28 *Ed. ſtat.* 3. *c.* 9. gives double damages to the demandant.

Not *ultra* 70 *annos.*

Went. Off. Exec. 213.

Notice.

The ſheriff, by ſtatute 13 *Ed. ſtat.* 1. *c.* 38. muſt not return men decrepit, *Senes ultrà* 70 *annos, homines non in patriâ commorantes*; this ſtatute is a direct prohibition in itſelf, and therefore the party grieved may have action on the act againſt the ſheriff, without giving notice of ſickneſs, or *Non-commorancy*; yet the uſe is to ſue out a writ grounded on this ſtatute, that he return them not, and notice by word is good, if notice were requiſite. 2 *Inſt.* 477.

And the equity of this ſtatute, and alſo the reaſon of the thing, ſeem plainly ſo far to extend to grand juries, that if it ſhall appear, that any of the perſons above mentioned be returned on a grand jury, the court will eaſily excuſe their non-appearance. But it ſeems clear, that any ſuch perſons being returned on a grand jury, may lawfully ſerve upon it if they think fit. 2 *Hawk. Pl. Cr.* 216. *ſect.* 20.

If a juror is above the age (*a*) of 70, or is ſick, or is non-reſident in the county, he may ſue out a writ of privilege for his diſcharge; but if he be returned and appear, he can neither be challenged by the party, nor excuſe himſelf from not ſerving, if there be not enow without him. 2 *Hawk. Pl. Cr.* 418. *ſ.* 26.

(*a*) Though a man be very aged, yet if he be of an able body, and not infirm, he is not to be excuſed from ſerving on the grand jury. 2 *Lil. Abr.* 156.

One *Butler*, a man of 72 years of age, was denied by *Rolle* Ch. Juſt. to be excuſed to ſerve, becauſe he was of an able body, and had his ſenſes and underſtanding perfect. *Id. ib.*

Peers

Peers of parliament not to be impanelled, nor tenants in ancient demeſne. Peers, &c.

Where the demandant or plaintiff is delayed of his ſuit, by ſuch return of the ſheriff, as *magis remotos*, he ſhall by the ſtatute recover damages againſt him; or where the defendant, after he has loſt his land by the oath of them ſo returned contrary to the form of the ſtatute, and after he doth convict them in an attaint, and ſo is reſtored, he may then have his action on the ſtatute for his damages. 2 *Inſt.* 448. Who is the party grieved that ſhall have his action.

If one dwell in *Middleſex*, and had freehold in the county of *York* over 40 *l.* the ſheriff of *York* may not ſummon him to *Middleſex* to try a cauſe at the bar in *Weſtminſter* for land in *Yorkſhire*. 13 *Edw. ſtat. c.* 42. *Rol. Rep.* 163. Freeholder in *York*.

In a writ of right, or any other writ, a baron of the realm may excuſe himſelf. 2 *Hawk. Pl. Cr.* 415. Peers excuſed.

Upon a trial between a peer and another, the ſheriff muſt return (*a*) a knight; but if he do not, and the peer doth not challenge the array, but the jury gave verdict, he ſhall not have advantage of this afterwards. Peer, a party, Knight ret'.

A jury was impanelled of the town of *Southampton*, and called to the bar and made default, and the men of that town ſhewed to the court a grant made to the inhabitants of that town, that no return ſhould be made of the men of that town to be of any jury, and prayed the allowance of their charter; and the court appointed them to plead their charter, and ſo they did. *Brownl.* 36. Town of *Southampton*. Allowance of charter.

Upon a petition from the governor and other gentlemen of the *Iſle of Wight* to the king in council,

(*a*) See 2 *Stra.* 1023. *Andr.* 133. 3 *Bac. Abr.* 252. Lord Ch. Juſt. *Holt* ſaid, that the reaſon knights were to be on a jury when a peer was concerned, was for the ſecurity of the commons, for a knight was preſumed to be a man of courage, *and not afraid to look a peer in the face.* 1 *Mod.* 102. But this challenge is now taken away by ſtat. 24 *Geo.* 2. *c.* 18. *ſ.* 4.

ſuggeſting that the inhabitants of that iſland ought to be *exempted from ſerving on juries, &c. in the county of* Southampton, *unleſs in matters concerning lands, and things, relating to the ſaid Iſland*, and this *for the better defending the ſaid iſland.* This matter was referred to Sir *John Keyling* Chief Juſtice, and to call to his aſſiſtance *Archer* J. the judge of the laſt aſſiſe there, who certified, that they had called before them the clerk of the aſſiſe for the county of *Southampton*, and others of great experience, who informed them, that in all former times ſheriffs have been choſen, and grand jurymen returned of the inhabitants of the ſaid iſland; but that the judges had always been careful, upon extraordinary occaſions of danger from any foreign enemy, to excuſe the appearance of thoſe inhabitants, when their attendance was neceſſary for the defence of the place; and they certified, that they conceived it would be a great inconvenience to the county of *Southampton*, that the inhabitants of ſo large and rich a place as that iſland is, ſhould be totally exempted from thoſe duties which are incumbent on the inhabitants of that whole county, *&c.* And after this certificate they heard no more of the buſineſs. 21 *Vin. Abr.* 209. *pl.* 8.

Sheriff may not allow it.

If a man has a charter of exemption, and ſheweth it to the ſheriff, yet he may return him, for the ſheriff is not a judge to allow or diſallow his charter, but he muſt ſue out a writ of allowance of his charter, and deliver the writ to the ſheriff, and ſhew his charter to him; and then if the ſheriff return him, action on the caſe lies againſt him.

Sheriff countermands the ſummons.

On a *Dorſetſhire* trial at the bar, on default of all the jurors but three, it appeared, that the ſheriff had, by command of the plaintiff, countermanded the ſummons againſt the gree of the defendant, who now prayed a trial: but this being impoſſible, for the court in ſuch caſe will not ſupply the jury with *Tales de circumſtantibus:* but they offered to *nonſuit* the plaintiff on record, and conceived the defendant ſhould contribute to the payment of the jury, be-

No *tales de circumſtantibus.*

cauſe

auſe they ſhould remain indifferent jurors. 2 *id.* 77.

Return of a *Diſtringas*, for appearance of the de- Precedent *London.*
ndant in the huſtings. 2 *Saund.* 233.

Return of a jury by the bedels of the four next ards. 2 *Saund.* 244.

If the ſheriff return but 40 *l.* which is the uſual Iſſues. Action. Caſe againſt the ſheriff for returning two ſeveral iſſues. Averment againſt the ſheriff's return of iſſues.
ſues on a *Diſtringas juratores*, the court on prayer the party cannot cauſe him to return greater; but ly make a rule, that good iſſues be returned. But *Twiſden*, action on the caſe lies againſt the ſhe- ff, *Keb.* 475. The plaintiff ought to bring a writ ainſt the ſheriff on averment, that he might have vied greater iſſues, and ſo the court may increaſe em.

Note, before ſtat. 13 *Edw. ſt.* 1. *c.* 39. the plain- ff could not aver againſt the return of the ſheriff if returned too ſmall iſſues, for he is but an officer court, and has no day in court to anſwer the aintiff party: but now by 1 *Ed.* 3. the plaintiff What ſhall be ſaid iſſues.
ay aver what the value of the iſſues be, rents of e land, corn in the grange, hay in the barn, all oveables except riding-furniture, and utenſils of e houſe.

Return of the grand inqueſt.

Stat. 11 *H.* 7. *c.* 9. No indictment ſhall be found Indictment.
any perſons named the juſtices, without due re- rn of the ſheriff, but by inqueſt of lawful liege eople returned by the ſheriff. One *Scarlet*, whom *Scarlet*'s caſe.
e ſheriff had not returned, by confederacy betwixt m and the clerk who read the panel, procured mſelf to be ſworn of the grand jury, with intent indict his neighbours maliciouſly, and he did ſo; was adjudged an offender within this law, and by at. 3 *H.* 8. *c.* 10. The juſtices of gaol-delivery, Juſtices may alter the panel.
juſtices of the peace, of whom one to be of the *uorum*, in open court may alter the panel returned the ſheriff to inquire of the king only, by addi- on or ſubſtraction of any of the jurors ſo returned, nd they have power to command the ſheriff to put

others in the panel according to their diſcretion. And the ſheriff ought to return the panel, ſo reformed, upon the penalty of the ſaid act. So that none can be of any grand inqueſt, but by the return of the ſheriff. 12 *Rep. Rob. Scarlet's* caſe.

Freeholders book.

It is very needful for the high-ſheriff to have a book containing the names of all the freeholders in his county, and their ſufficiencies, that he may make the panels according to his oath, and better know pledges and ſureties.

Iſſues to be eſtreated.

As for iſſues loſt for default of appearance, *ſcilicet* by jurors, or by tenant or demandant; the ſheriff may not levy till they ſhall be eſtreated under the ſeal of the *Exchequer*, and the ſame delivered to him, for without warrant he may not levy the ſame. 27 *Ed. c.* 7.

Other erroneous proceedings and miſdemeanors of ſheriffs, about and concerning jurors.

Superſedeas reſtrains the ſheriff from returning a jury.

After the parties were at iſſue in treſpaſs, and an *Habeas corpora* awarded againſt the jury, the *Common Bench* (in which the action depended) awarded a *Superſedeas, quia improvide, &c.* which was delivered to the ſheriff, who notwithſtanding returned the jury, and tried the cauſe. This was aſſigned for error, and in *Nullo eſt erratum* pleaded, it was adjudged error. For the error aſſigned is a matter of fact, depending on a matter of record; and then the defendant by pleading *In nullo eſt erratum* had confeſſed this, (that is to ſay) that ſuch *Superſedeas* was awarded and delivered to the ſheriff before the trial. Upon which it follows, that after the *Superſedeas* delivered, the hands of the ſheriff are cloſed, that he cannot proceed to diſtrain the jury, nor to return the writ before the juſtices of aſſize. It is a manifeſt error, if the ſheriff return the writ of *Habeas corpora* at the aſſizes of *Niſi prius* after *Superſedeas* awarded for ſtaying the return of the writ; as the proceedings are erroneous in *inferior courts* after *Habeas*

What is confeſſed by pleading *In nullo eſt erratum.*

beas corpus delivered without a *Procedendo*. *Yelv.* 57. *Cro. Jac.* 43. *pl.*

It is not neceſſary for the ſheriff to return the panel of the jurors names, but to ſay they are *de vicineto* of ſuch a place; for ſo it ſhall be intended, and the forms of all returns of jurors are ſo. Reaſonable things ſhall be intended to be done.

In a writ of error eleven jurors were returned and one ſtranger; yet becauſe it was the return of the ſheriff, it ſhall not abate. *Rol. Rep.* 302. A ſtranger returned.

The ſtatute of 27 *Eliz. c.* 6. provides, there ſhall be two *(a)* hundredors in a jury; yet it is never ſeen that the return of the ſheriff is ſo. So the ſtatute of 42 *Ed.* 3. *c.* 11. is, that the ſheriff ſhall arraign the panel in aſſize four days before the aſſize, yet it is never returned to be ſo done; but ſuch reaſonable things ſhall be intended to be done, unleſs the contrary appear. 2 *Sid.* 144. Reaſonable thing intended to be done.

An attorney was picked over the bar, for giving directions in writing to a ſheriff to return jurors names. *Mo.* 882. *pl.* 1237. Attorney puniſhed.

" All jurors (other than ſtrangers upon trials *per medietatem linguæ*) to be returned for trials of iſſues joined in the courts of *King's Bench*, *Common Pleas* or *Exchequer*, or before juſtices of aſſize or *Niſi prius*, *Oyer* and *Terminer*, gaol-delivery or quarter-ſeſſions, in any county of *England*, ſhall have within the county 10 *l.* by the year of freehold or copyhold, or antient demeſne, or in rents, in fee-ſimple, fee-tail, or for life; and in every county of *Wales* every ſuch juror ſhall have 6 *l.* by the year as aforeſaid; and if any of a leſſer eſtate be returned, it ſhall be a good cauſe of challenge, and the party returned ſhall be diſcharged upon the ſaid challenge, or upon his own oath. And no juryman's iſſues ſhall be ſaved but by order of court, for ſome reaſonable cauſe proved upon oath; and all iſſues ſhall be duly eſtreated and levied; and the writ of *Venire facias* for impanelling of juries in caſes aforeſaid, in *England* ſhall be after this form: *Rex, &c. Præcipimus, &c. quod venire fac' coram, &c. duodecim liberos & legales* Jurymen to have 10 *l. per annum* in the county. In *Wales* 6 *l.* Iſſues to be duly eſtreated and levied.

(a) See now ſtat. 4 *An. c.* 16. *ſ.* 6.

homines

homines de vicineto de A. *quor' quilibet habeat decem librat' terræ tenementor' vel reddituum per annum ad minus, per quos, &c. et qui nec, &c.* and the writs for returning of juries in *Wales*, ſhall be in the ſame manner, altering only the word *decem* for *ſex*; and the ſheriff ſhall not return any perſon, unleſs he have 10 *l.* or 6 *l.* reſpectively by the year at leaſt, in the county; upon pain to forfeit for every perſon 5 *l.* to their majeſties." Stat. 4 & 5 *W.* & *M. c.* 24. *ſect.* 15. 3 *Geo.* 2. *c.* 25. *ſect.* 20.

Summons. They muſt be ſummoned ſix days before the day of their appearance, and none ſhall take a reward to excuſe a juror's appearance, on pain to forfeit 10 *l.* to their majeſties. 7 *W.* 3. *c.* 32. *ſ.* 5. 4 & 5 *W.* & *M. c.* 24. *ſ.* 16.

This act extends not to cities, boroughs or towns corporate. 7 *W.* 3. *c.* 32. *ſ.* 12. 4 & 5 *W.* & *M. c.* 24. *ſ.* 17.

"Any perſon having land in his own right of the yearly value of 20 *l.* over and above the reſerved rent, being held by leaſe for the abſolute term of 500 years or more, or for 99 years, or any other term determinable on one or more lives, the name of every ſuch perſon ſhall be inſerted in the liſts, and in the freeholders book; and ſuch leaſeholder may be ſummoned to ſerve on juries as freeholders may." Stat. 3 *Geo.* 2. *c.* 25. *ſ.* 18.

From hence it appears, that lands *freehold, copyhold, antient demeſne, or leaſehold*, do render perſons liable to ſerve on juries. And ſome have thought that all lands are included under theſe denominations. And in *Coke's Copyholder*, *p.* 14. it is ſaid, that what land ſoever is not copyhold, is freehold. And in *Calthr.* 41. it is ſaid, that copyhold lands may differ in name, but not in nature; for although copyhold lands may be ſpecially ſo called, becauſe holden by copy of court-roll, and cuſtomary lands by ſome ſpecial cuſtom; yet they are all holden in one general kind, that is by cuſtom, and the diverſity of their names doth not alter the nature of their tenure. Nevertheleſs, although all copyhold lands are cuſtomary, yet all cuſtomary lands are not

copyhold, and conſequently, as ſuch, do not qualify a man to ſerve on juries. Of which kind of cuſtomary lands, not being copyhold, the greater part of the county of *Weſtmorland* in particular doth conſiſt, for which cauſe (and by reaſon of the number of perſons being diſqualified by being quakers) the jurors in that county are in compariſon but few. To remedy which inconvenience, it ſeemeth not unreaſonable, that in the ſtatutes limiting the qualification of jurors, amongſt other denominations of tenure, the word *cuſtomary* ſhould be inſerted; for why ſhould a copyholder of 10*l.* a year be obliged to ſerve, and a cuſtomary tenant of 100*l.* a year be exempted.

On ſheriffs, *&c.* returning perſons not in the liſts, and on clerk of aſſize falſely recording appearances.

" If any ſheriff or officer ſhall ſummon and return any perſons to ſerve on any jury before the juſtices of aſſize, *Niſi prius*, or judges of the great ſeſſions in *Wales*, or of the ſeſſions for the counties palatine, whoſe name is not inſerted in the duplicates tranſmitted to him by the clerk of the peace; or if any clerk of aſſize, judge's aſſociate, or other officer, ſhall record the appearance of any perſon ſo ſummoned and returned, who did not really appear, then any judge of aſſize, *Niſi prius*, *&c.* ſhall, upon examination in a ſummary way, ſet ſuch fines upon ſuch ſheriff, *&c.* for every perſon ſo ſummoned and returned, and for every perſon whoſe appearance ſhall be ſo falſely recorded, as the ſaid judge ſhall think meet, not exceeding 10*l.* nor leſs than 40*s.*" Stat. 3 *Geo.* 2. *c.* 25. *ſect.* 3.

" No perſons ſhall be returned as jurors at any aſſizes or *Niſi prius*, *&c.* who have ſerved within one year before in the county of *Rutland*, or four years in the county of *York*, or within two years in any other county, not being a county of a city or town; and if any ſheriff ſhall wilfully tranſgreſs therein, any judge of aſſize, *&c.* is required, on examination and proof of ſuch offence, in a ſummary way, to ſet a fine upon ſuch offender, not exceeding 5*l.* *Id. ſect.* 4. (*a*)

(*a*) This clauſe extended to *Middleſex* by ſtat. 4 *Geo.* 2. 7. *ſect.* 1. See 3 *Bac. Abr.* 241. in marg'.

" No

Jurors in *Middleſex* liable to ſerve again after two terms.

" No perſon ſhall be returned to ſerve as a juror at *Niſi prius* in *Middleſex*, who has been returned at *Niſi prius* in the ſaid county in the two terms or vacations next preceding, under ſuch penalty upon the ſheriff, *&c.* as might have been inflicted for any offence againſt the ſaid clauſe. Stat. 4 *Geo.* 2. *c.* 7. *ſect.* 2.

Sheriffs to regiſter the names of jurors.

" Every ſheriff, *&c.* ſhall regiſter the names of ſuch perſons as ſhall be ſummoned and ſerve as jurors at any aſſizes, *&c.* alphabetically, and the times of their ſervices; and every perſon ſo ſummoned and ſerving ſhall, upon application to the ſheriff, *&c.* have a certificate teſtifying his attendance, which the ſheriff, *&c.* is to give without fee; and the book ſhall be tranſmitted by the ſheriff, *&c.* to his ſucceſſor. 3 *Geo.* 2. *c.* 25. *ſect.* 5.

Penalty of taking money for excuſing.

" No ſheriff or other perſon ſhall take any reward, to excuſe any perſon from ſerving on juries; and no officer appointed to ſummon juries ſhall ſummon any perſon other than ſuch whoſe name is ſpecified in a mandate ſigned by the ſheriff, *&c.* and if any ſheriff or officer ſhall wilfully tranſgreſs in the ſaid caſes, any judge of aſſize, *&c.* may, on examination and proof of ſuch offence, in a ſummary way, ſet a fine on any perſon ſo offending, not exceeding 10 *l.* *Ibid.* *ſect.* 6.

In cities, *&c.*

" Where a ſpecial jury ſhall be ordered by rule of court, in any cauſe ariſing in a county of a city or town, the ſheriff ſhall be ordered by ſuch rule to bring the books of perſons qualified to ſerve on juries within the ſame, in like manner as the freeholders book hath been uſually ordered to be brought in order to the ſtriking of juries for trials at bar, and the jury ſhall be ſtruck out of ſuch books." *Ibid.* *ſect.* 17.

No ſpecial juries in treaſon or felony.

On a motion for a ſpecial jury, in the caſe of the *King* v. *Makartney* for the murder of the duke of *Hamilton*, it was held by *Parker* Chief Juſtice, That there cannot be a ſpecial jury in caſes of *treaſon* or *felony*; for the party muſt have the advantage of challenging 20, without cauſe ſhewn. In caſes of ſpecial juries there are 48 brought before the maſter, and

and he takes 24; ſo there cannot be a rule for a good jury, nor for a ſpecial jury in this caſe of a trial at bar; for the jury will be the ſame with or without ſuch a rule, for they are all good juries in *Middleſex*, and ſo in all caſes of jurors at the bar; and if there ſhould be a ſpecial jury, it would take away the advantage the party has of challenging peremptorily, but indeed it would not of ſhewing cauſe. So no rule was made in this caſe, for fear that the ſheriff in all other caſes, when there is no ſuch rule, ſhould not return a good jury. *By Court.* 21 *Vin. Abr.* 301. *pl.* 5. 2 *Burn's Juſt. qto.* 9.

In *London* jurors to be houſekeepers, and worth 100 *l.*

The ſheriffs of *London* ſhall not return any perſon to try any iſſue joined in any of his majeſty's courts of *King's Bench*, *Common Pleas* or *Exchequer*, or to ſerve on a jury at the ſeſſions of *Oyer* and *Terminer*, or ſeſſions of the peace to be held for the city, who ſhall not be a houſekeeper within the city, and have lands, *&c.* or perſonal eſtate to the value of 100 *l.* and the ſame cauſe alledged by way of challenge, and found, ſhall be admitted as a principal challenge; and the perſon challenged may be examined on oath of the truth of the matter. 3 *Geo. c.* 25. *ſect.* 19.

Qualification in capital caſes.

"The ſheriffs or other officers ſhall not return any perſon to ſerve on a jury for the trial of any capital offence, who would not be qualified to ſerve as a juror in civil cauſes; and the ſame matter ſhall be a principal challenge; and the perſon ſo challenged may be examined on oath of the truth of the matter." *Ibid. ſect.* 20. perpetuated by ſtat. 6 *Geo.* 2. *c.* 37.

Leaſeholders of 50 *l.* a year qualified.

"All leaſeholders upon leaſes where the improved rents ſhall amount to 50 *l. per ann.* over and above ground rents or other reſervations, ſhall be liable to ſerve upon juries." Stat. 4 *Geo.* 2. *c.* 7. *ſect.* 3.

Of

Of challenges.

Challenges.

A challenge to the jurors is two-fold:

To the { Array, Polls.

To the array, is to except againſt all the perſons impanelled: and as to this, there is a

Challenge { Principal, or for Favour.

Challenge to the array.

Note; That the challenges to the array is in reſpect of the partiality or default of the ſheriff, or other officer that made the return, and not in reſpect of the perſons returned, where there is no partiality or default in the ſheriff. For if the challenge to the array be found againſt the party that takes it, yet he ſhall have his particular challenge to the polls.

Affinity of ſheriff.

If the ſheriff, or other officers, be of kindred or affinity to the plaintiff or defendant, if the alliance continue, it is a good cauſe of challenge. *Bulſtr.* 5, 6, 7, 8.

Sheriff couſin to defendant. Averment.

It is clearly a good challenge to the array, that the ſheriff is couſin to the wife of the defendant, though the wife is no party to the action: but it muſt be averred that ſhe was alive, or had iſſue at the making of the panel.

Trial of challenge.

Eliſors.

The jury may try a challenge for coſinage of the ſheriff to the plaintiff or defendant, and ſometimes the coroners, or attornies in court, are *Eliſors.* 2 *Rol. Rep.* 363. 2 *H. H. P. C.* 275. *cap.* 36. 21 *Vin. Abr.* 286. *pl.* 18.

Sheriff couſin to the plaintiff, &c.

If the defendant challenge the array, for that the ſheriff is couſin to the plaintiff; it is no counterplea of the challenge, that the ſheriff is alſo couſin to the

the defendant; but the array ſhall be quaſhed, because the defendant firſt took the challenge. Array quaſhed.

If any one or more of the jury be returned at the denomination of the party, plaintiff or defendant, the whole array ſhall be quaſhed. Array quaſhed.

Challenge was taken to the array, becauſe the ſheriff was couſin to the leſſor in *Ejectment*, and concludes not to the favour; it is a principal challenge. And in *Rol. Rep.* 183. it is adjudged a principal challenge: yet in *Rol. Abr.* 328. *Gueſt* and *Bridgman*, ſaith, it is not a principal challenge that the leſſor is couſin. But in the lord *Brook*'s caſe it is a principal challenge. *Cro. Jac.* 547. *pl.* 6. Sheriff couſin to leſſor.

Venire fac' was awarded to the coroners on ſurmiſe, that the leſſor in *Ejectment* was a ſervant to the ſheriff. It was doubted, whether it was a principal challenge, in 1 *Jac. Harbottle*'s caſe. *Coke* ſaid, it was adjudged in 27 *El.* in *Packington*'s caſe, that it was not a principal challenge; but in *Spicer*'s caſe it is reſolved otherwiſe. *Cro. Jac.* 21. *Dy.* 7, 367. Leſſor ſheriff's ſervant.

If the challenge be taken for coſinage, it ought to be ſhewed *coment* couſin; but in ſuch caſe challenge to a juror is not neceſſary. Juror couſin.

If the plaintiff or defendant have an action of *Battery* or *Debt* againſt the ſheriff, or if the ſheriff have parcel of the land depending on the ſame title; or if the ſheriff or his bailiff be either of counſel or attorney, or ſervant or goſſip of either party, all the array ſhall be quaſhed. Upon ſheriff's account.

A prayer to *Eliſors* in trials at bar may be at the ſuit of the defendant or plaintiff; but in *Niſi prius*, at the prayer of the plaintiff only. *Eliſors*.

Conſanguinity or affinity are the principal cauſes; but it is no challenge to the array, if all the jurors be of affinity. Principal cauſes.

Challenge to the array for favour, that the ſheriff is ſervant to the plaintiff, or was arbitrator for a party: that the ſheriff purchaſed part of the land in queſtion: that one party is tenant or ſervant to the ſheriff. To the array touching ſheriff.

Malice between the ſheriff and one of the parties, is good cauſe of challenge, that one of the parties For malice.

has

has brought an action of *Debt* againſt the ſheriff, &c. but not that the officer has debt againſt the party; for he may demand his debt without malice.

Triers. But this kind of challenge being no principal challenge, muſt be left to the conſcience and diſcretion of the triers.

Challenge to the Polls. Secondly, *Challenge to the Polls*, *i. e.* to the particular jurors; and theſe are of four ſorts.

Peremptory. 1. Peremptory, without ſhewing any cauſe; and this for treaſon is 35. Felony 20.

Principal. 2. Principal challenge to the polls; ſo called, becauſe it ſtands of itſelf, without leaving any thing to the conſcience or diſcretion of the triers. Now this is ſuch matter as proves evident favour or enmity in the juror.

Propter reſpectum. And this is, *Propter reſpectum*; as the nobility may be challenged, or he may challenge himſelf.

Defectum. *Propter defectum*, as aliens, villains; not having freehold ſufficient; not having two hundredors.

Affectum. *Propter affectum*, as jurors of kin or blood to either party; that he has formerly tried the cauſe; counſel, not a commiſſioner for examination of witneſſes; fellow-ſervant; for favour;

Delictum. *Propter delictum*, as outlawed, *&c.*

Cauſe. 3. Challenger to the poll muſt ſhew cauſe preſently. After one hath taken challenge to the poll, he cannot challenge the array.

Cauſe againſt ſheriff or coroners. 4. If the plaintiff alledge a cauſe of challenge againſt the ſheriff, the proceſs ſhall be directed to the coroners; and if any cauſe againſt all the coroners, then the court ſhall appoint *Eliſors*. Sometimes two of them that be impanelled.

Eliſors.

Triers. When any challenge is made to the polls, two triers ſhall be appointed by the court.

When taken. *Note*; All challenges muſt be taken before the jurors are ſworn.

Triers. No challenge ſhall be admitted againſt the triers appointed by the court.

After a *Tales*. There may be a challenge to the panel by exception to the ſheriff, after a *Tales* prayed to him: So after a *Venire fac'* prayed to him, tho' the cauſe of challenge were before the prayer. *Hob.* 235.

Upon

Upon a writ of error the record was certified, that the challenge was to the ſheriff for coſinage, and after a *Venire fac'* awarded to the coroners; upon the diminution it may not be certified, that the challenge of the coſinage was after the return of the *Venire fac'*; becauſe this is contrary to the record before certified. *Rol. Abr.* 764. Error. Diminution.

That the ſheriff was *quondam* ſervant to the defendant, earl of *Rutland*, is no principal challenge; it is paſt and executed. *Aliter*, had it been ſo at the time. *Quondam* ſervant.

To ſay, that between the ſheriff or officer that returns the panel, and one of the defendants, there was an action of *Treſpaſs* then depending, is a principal challenge. *Trans. int' vic', &c. & def'.*

CHAP. X.

Habeas Corpus.

AN *Habeas corpus* is either *ad ſubjiciend'*, which is granted on the criminal ſide, or an *Habeas corpus ad reſpondend', recipiend'* or *faciend'* granted on the plea ſide; for ſo the court of the *King's Bench* is divided in the practice of it, (that is to ſay) into criminal cauſes between the king and the party, and civil cauſes between ſubject and ſubject. *Habeas corpus ad ſubjiciend', ad reſpondend', recipiend, &c.*

Now an *Habeas corpus ad reſpondend'* is, when any one is impriſoned at the ſuit of another upon a legal proceſs in the *Fleet*, or any other priſon except the *King's Bench* priſon, and a third perſon would ſue that priſoner in this court (*B. R.*) and cannot, becauſe he is not in cuſtody of the marſhal of this court, there he may have an *Habeas corpus* to remove the priſoner out of the priſon where he is, to this court, to anſwer to his action here. 14 *H. Abr.* 210. *pl.* 1. This is called an *Habeas corpus cum* *Hab. cor. ad reſpondend'.* *Is an habeas corp. cum cauſa.*

cum causâ, and doth remove the prisoner for whom it is granted, and all the causes which are then depending against him; for upon *Habeas corpus* to an inferior court, to remove *Corpus cum causâ*, they ought to return all the causes that are depending there concerning the party that hath the *Habeas corpus*, if any of the causes depending be above 5*l*. *Stile's Rep.* 150.

Bail. When an *Habeas corpus* is awarded, and bail taken, though they be not filed, yet presently the prisoner is discharged, and his sureties also in the inferior court. *Cro. Jac.* 203. *pl.* 5.

One was in execution in the *Fleet*, for a debt recovered against him in *C. B.* he being before condemned in the *King's Bench* for another debt, was by *Habeas corpus cum causâ* removed into the *King's Bench*. *By court:* In this case he may acknowledge satisfaction for both debts in *B. R.* he being in the custody of the marshal for both debts. If the marshal suffers him to escape, he shall be charged for both the debts. *Dy.* 152, 307.

Return of *Hab' corp'*. An *Habeas corpus* to remove one committed for debt from one prison to another, may be granted returnable *immediate* or *indilate*, for this is only an *Habeas corpus ad recipiend'* in the nature of it.

Ad recipiend'.

Amendment. An *Habeas corpus* is not a record till it be returned and filed, and then it cannot be amended; but it may be amended before it is filed.

Conclusion of the return. Whatsoever person, or by what means soever he was committed, the conclusion of the return ought to be, *Corpus tamen ejus paratum habeo*; yet it can not always be so. *Leon.* 70.

Return of the chancellor of *Durham*. An *Habeas corpus ad subjiciend'* is always intended to him that has the body, though *ad faciend'* may be circular, as an *Habeas corpus* was directed to the chancellor of *Durham*, that he make a precept to the sheriff, to have the body *coram nobis apud West*. The return is, that the chancellor issued a precept to the sheriff to return his body before him, and that the sheriff returned *paratum habet*; and it's not that the chancellor had him here, which is ill *by*

for it ſhould be, *cujus corpus paratum habeo* in this court. 3 *Keb. Rep.* 279. *pl.* 30.

Habeas corpus was directed to the ſteward and marſhal of the *Marſhalſea*, for one *H.* The marſhal returns, the ſaid *H.* was committed to his cuſtody by *command of Sir* Francis Walſingham, *Knt. principal ſecretary of ſtate, and one of the Queen's privy council.* This is inſufficient, becauſe the commitment is not ſet down in the return. Then it was amended and returned in this manner: *By the advice and command of the Queen's whole privy council, ſo that we cannot have his body.* This, *by the court*, is inſufficient alſo; he ought to have concluded, *yet I have his Body ready.* Cauſe of commitment ſhewed.

On *Latitat*, the ſheriff returned, that he had arreſted the defendant, and that ſuch a day, and before the return of the *Latitat*, an *Habeas corpus* was to bring the body into *Chancery*, and there the priſoner was diſcharged; the return is good, for the ſheriff is bound to obey the King's writs, and he cannot compel the parties to put in ſureties here in *B. R.* But it was ill done of the *Maſter of the Rolls* to diſcharge him. *By court*, We have oftentimes perſons here upon *Habeas corpus*, who are alſo arreſted by proceſs out of the *Exchequer*, or of the *Common Pleas*; but we will not diſcharge them before they have found ſureties for their appearance, and we cannot puniſh the ſheriff, for the *Habeas corpus* was firſt returnable before the *Latitat*. But becauſe the return was, *that he was diſcharged out of our cuſtody*, which might be intended as to the cauſe in *Chancery* only, and not for the cauſe here, for he hath not alledged that he was committed to any other in cuſtody: the ſheriff was to amend his return. *Leon.* 145. *pl.* 201. By *Habeas corpus* to bring into *Chancery*. Amendment.

A return of *Habeas corpus* by the warden of the *Fleet*, was *for a contempt out of the court of Chancery.* It is not good. *Rol. Rep.* 92.

On *Habeas corpus*, the ſheriff returns, that the juſtices of peace committed the plaintiff for a fine on contempt, for which the court awarded him to remain in priſon till payment. *Sid.* 144. That the juſtice committed him for a fine.

Protection. The return on *Habeas corpus* was a protection. *Leon.* 71. *pl.* 93.

Return to be written on parchment. *Note*; The return of an *Habeas corpus* ought to be written on parchment, and not on paper; for the return is to be filed and made a record of court, and all records are to be written on parchment: and therefore, after the return is read and filed in court, it cannot be amended. But in *Hob.* 113. an *Habeas corpus* was returned without the ſur-name of the

Amended. ſheriff, and after verdict amended.

Good to common intent. It is agreed, the return of an *Habeas corpus* need not be ſo punctual as a plea, becauſe not made by perſons of ſuch learning as pleas are; but if they be good to common intent and ſubſtance, it is enough.

Rule to bring in the body. Upon *Habeas corpus* granted by the *King's Bench* to the *warden of the Fleet*, to have here in court the body of *D. W.* the ſame returnable at a day certain; at which day the *warden of the Fleet* did refuſe to make his return, and to bring in the body. And the court entered a rule to bring in the body of *D. W.* the next day *ſub pœna* 20*l.* and ſo are all precedents of felony and treaſon.

Diſcrge. *Note*; If it appear that the commitment is good, and there is good cauſe, the court remands the priſoner; if it is not good, they diſcharge him; if it be doubtful, they bail him.

Who to pay the charges of the return. The ſheriff may ſuggeſt, that the party will not pay his charges of return of *Habeas corpus, ad faciend' & recipiend'*, which is at the ſuit of the party. But *contra* in *Habeas corpus, ad faciend' & ſubjiciend'*, which is at the ſuit of the King, he muſt return at his peril. *Keb. Rep.* 272. *pl.* 57. 280. *pl.* 79.

Court will allow charges, And on *Habeas corpus* to remove any priſoner, the ſheriff muſt return the writ, and the court will allow his charges here. So in the caſe of the ſteward of ———.

And compel payment. Upon *Habeas corpus*, the officer ought to bring the priſoner to the court, and the court ſhall tax charges and compel payment, if the officer and priſoner or plaintiff cannot agree, or payment be not made according to the agreement. 2 *Jo.* 178.

A priſoner was brought up from *Oxford* gaol by *Habeas corpus*, in order to be turned over to the *King's Bench*; but the court refuſed to do it, becauſe the ſheriff was not paid the charges of bringing him up, and ſo he was remanded. *Stra.* 308.

The court will not turn over a priſoner till officer paid for bringing him up.

On a motion againſt *Bambridge* the warden of the *Fleet*, it was held that if an *Habeas corpus* is brought, he muſt obey it, though the party refuſes to pay his fees; for he has a remedy for them. 2 *Stra.* 814.

Officer muſt obey writ, though fees unpaid.

On a *Habeas corpus*, the gaoler is bound to bring the body, though he has not the charges tendred him; but he may move the court, and they will rule that he ſhall have his charges firſt. 2 *Show.* 172.

A gaoler at his own charge brought up a priſoner upon a *Habeas corpus*, and the priſoner refuſing in court to repay the gaoler, he was remanded by rule of court. *Cumb.* 36. Gaoler may detain a priſoner after a *Habeas corpus* directed to him for his fees, but not for chamber rent, *&c.* *Cumb.* 109. The plaintiff cauſed the defendant to be brought up by *Habeas corpus* from *Stafford*, and now the gaoler moved to be allowed his *charges* for bringing him up; but the court ſaid, he ſhould have agreed with the plaintiff before he brought him. *Holt* Chief Juſtice bid him to take his action againſt the plaintiff for his charges. *Cumb.* 229.

CHAP. XI.

Writ of Inquiry.

Time of execution.

IF a writ of inquiry of damages be returnable, *Oct. Mich.* the ſheriff may take the inqueſt, and enquire the damages the day of the return; and if he returns it the ſame day, the writ is well executed. *Cr. El.* 468. *(bis) pl.* 26. 7 *Vin. Abr.* 214. *pl.* 2. 17 *Vin. Abr.* 539. *pl.* 4. 2 *R. Raym.* 1449. *Lil. Abr.* 876. (E). *Mo.* 403. *pl.* 537. *Id.* 712. *pl.* 998. *Barnard. K. B.* 4.

How far a writ of inquiry ſhall be ſet aſide.

Motion to ſet aſide a writ of inquiry for two irregularities; the firſt was, for that the notice for executing it was at ſuch a day at eleven o'clock, and it was executed at half an hour after eleven, though the defendant was not there; whereas, by the rules of the court, it ought not to have been executed till an hour after the notice, if both parties are not there ready. The other irregularity was, that the plaintiff gave no evidence to the jury, and yet they have given him damages, which he ſaid was always a cauſe for ſetting them aſide: accordingly the court did ſet it aſide. *Barnard. K. B.* 33. See 2 *Barnard. K. B.* 214.

Eſſoin day.

On a writ of inquiry, the inqueſt was impanelled the eſſoin day, and the jury then hear the evidence two or three days after, yet this is well executed. 17 *Vin. Abr.* 539. *pl.* 4.

On a *Sunday*.

A writ of inquiry was returnable *tres Trin.* which happened to be on a *Sunday*, ſo that the eſſoins were kept on the *Monday*; the writ was returned to have been executed on the 14th of *June*, which was the *Monday*, *i. e.* the day after the return. And by the whole court, Although without doubt a writ may be executed on the day of its return, yet if that day be ſuch as it cannot legally be done on, you ſhall not do it the next day. 2 *Salk.* 626. *pl.* 8. 6 *Mod.* 148, 149. See 2 Ld. *Raym.* 1066. *Barnard. K. B.* 356.

A writ of inquiry was executed 15 *June*, which was on a *Sunday*; held nought, and that they might take advantage of it on a writ of error, though not aſſigned for error. *Forteſc. Rep.* 373. *Stra.* 387.

Verbal deputation, for executing writ of inquiry, inſufficient; it ſhould be in writing, under hand and ſeal.

Writ of inquiry directed to the coroners of *N.* was executed by *H.* clerk to the coroners, and their known deputy, but only by verbal appointment, without deputation under hand and ſeal from the coroners. Court ſeemed inclinable to ſet the inquiry aſide for want of a proper authority in *H. Pract. Reg. C. P.* 451. 2 *Barnes* 325. *Rep. & Caſ. of Pract. C. P.* Court ſaid the verbal appointment was no authority, but objection was waived by defendant's having made defence. Held, that a writ of

of inquiry executed before an under-ſheriff's deputy was improperly executed, for a deputy cannot appoint a deputy. 2 *Barnes N. C. P.* 187. *Pract. Reg. C. P. Rep. & Caſ. Pract. C. P.*

Inquiry executed before a deputy appointed by a deputation under the ſeal of the ſheriff's office, good; and rule to ſhew cauſe why inquiry, *&c.* ſhould not be ſet aſide. Diſcharged with coſts. 2 *Barnes* 188. *Pract. Reg. C. P. Rep. & Caſ. Pract. C. P.*

Upon a writ of inquiry upon a judgment by default, upon an *Aſſumpſit*, (if it be inſiſted on) plaintiff muſt prove his debt; for by the judgment plaintiff is to recover, but the *quantum* is to be inquired into by the jury, and if plaintiff is to recover, *&c.* if plaintiff proves nothing, he muſt be content with a penny, or ſome ſuch ſmall matter of damages. 7 *Vin. Abr.* 315. *pl.* 6. *Ventr.* 347. 2 *Show. Rep.* 86. Debt muſt be proved.

The execution of a writ of inquiry before 14 jurors was held good, for it is but an inqueſt of office whereon no attaint lies. 2 *Stra.* 1159. *Noy* 142. Before 14 jurors.

In this writ, to inquire of damages in *Treſpaſs*, the jury cannot find that no treſpaſs is done. Neither may the ſheriff make ſuch a return, but if the jury will find no damages, the ſheriff muſt make his return accordingly. No damages found.

In all ſuperior courts the judge ſends his precept to the ſheriff to inquire of damages, but in *London*, and in all other inferior courts an inqueſt is ſummoned in court, and the court takes the inquiſition of damages. 3 *Salk.* 400. *pl.* 2.

On executing a writ of inquiry, notes muſt be produced and proved; pleading is not a ſufficient admiſſion of them. 2 *Barnes's Notes C. P.* 192. Held contrary in the *King's Bench*. 2 *Stra.* 1149. After judgment by default, note ſet out in declaration muſt be proved.

If upon the executing a writ of *inquiry of damages*, the ſheriff refuſeth to ſwear and examine ſome of the witneſſes produced on either part, and yet doth execute the writ, the court will grant a new writ to the party grieved, for the old writ was not well executed. A new writ granted.

A writ of *inquiry of damages*, directed to the ſheriff, cannot be executed by a bailiff of a liberty. *Hob.* 83.

Amended.

A writ of *inquiry of damages* varied in the return from the award in the roll, which was amended and made agreeable to the roll. *Mo.* 711. *pl.* 998. A writ of inquiry cannot be quaſhed till it be returned and filed, but before the return it may be ſuperſeded, *quia erronice emanvit*; *per Holt*, 6 *Mod.* 40. And by him you cannot except againſt a juror upon executing a writ of inquiry. *Ibid.* 43. *Inſtr. Clr.* 558.

Quaſhed.

Superſeded.

CHAP. XII.

Gaols and Priſoners.

County gaol inſeparable to the office of ſheriff.

THE cuſtody of county gaols is incident to the office of ſheriff, and inſeparable from the ſheriff; and therefore if the King grant the cuſtody of ſuch gaol to another, it is void: for the ſheriff is the immediate officer of the King's courts, and ſhall be anſwerable for eſcapes, and be ſubject to amerciaments, and therefore he ſhall put in ſuch keepers as he ſhall anſwer for. 4 *Co.* 34. 14 *Ed.* 3. *ſtat.* 1. *c.* 10. Confirmed by 19 *H.* 7. *c.* 10.

To put in keepers for whom anſwerable.

The place where to be kept.

The ſheriff may remove his gaol from one place to another within his bailiwick, and the ſheriff may hold the *aſſizes* in the caſtle where he held them by preſcription, although the King grant the cuſtody of the caſtle to another. So that though the ſheriff may keep the gaol in what place he will within his bailiwick, yet in a particular place not without preſcription. *Hob.* 202. *Ander.* 345.

The King may make a county, &c.

As the King may by his letters patent make a county, ſo he may, in the making of it, ſave and except to him and his ſucceſſors ſuch part of the juriſdiction or privilege, which the other county (from which it is exempted) had in it before. As in many places in the realm, the gaol of a town, which is a county of itſelf, or a place privileged from the county, is the gaol of the county, and the place

where

where the aſſizes or gaol-delivery is holden, is within the county of the town, and yet ſerves alſo for the county at large. As in the ſeſſions-hall at *Newgate*, which ſerves as well for the county of *Middleſex* as for *London*; and yet it ſtands in *London*: but by uſage it hath been ſo. And ſo the gaol of *Berry*, &c. *Poph.* 16.

Gaol both for the town and county.

London.

Berry.

Though *Newgate* is a ſeveral priſon both for *London* and *Middleſex*, yet a priſoner in *Newgate*, in *London* ſide, ſhall not be charged with actions in *Middleſex*.

Difference of *London* ſide and *Middleſex*.

The ſheriffs of *London*'s court is moveable, and the ſheriff is chargeable with a priſoner while he is in priſon, though he be judge alſo. For why ſhould the city ſerjeants give ſecurity to the ſheriff, unleſs the ſheriff be the officer? And it hath been ruled, that although the ſheriff be judge, yet a precept is directed to him. Therefore it is a good plea in debt on eſcape, that the ſheriff commanded the ſerjeant at mace to deliver the priſoner to him. *Sid.* 318. *pl.* 6. *Keb. Rep.* 147. *pl.* 22.

Priſon of the ſheriffs of *London*.

The ſheriffs of *London* may make their houſes their priſons, as well as the compters; and the bringing the perſon arreſted to the ſheriff, albeit it be *ſub die*, and not into any houſe, yet it is as good as delivering into the ſheriff's priſon. *Id. ib.*

May make their houſes priſons.

No priſoner ſhall be put in irons but ſuch as have been apprehended for felony, or treſpaſſes committed in parks or vivaries, and thoſe who have been found in arrear upon account; nor ſhall any priſoner be puniſhed or tortured in any other manner, than by (a) law they ought, and that none diſſeiſe them whilſt they are in priſon, of any thing which belongs to

Priſoners, how to be treated.

(a) And therefore this liberty can only be intended, where the officer has juſt reaſon to fear an eſcape, as where the priſoner is unruly, or makes an attempt to that purpoſe; but otherwiſe, notwithſtanding the common practice of gaolers, it ſeems altogether unwarrantable, and contrary to the mildneſs and humanity of the laws of *England*, by which gaolers are forbid to put their priſoners to any pain or torment. *H. H. P. C. p.* 601. in notes.

them.

them. *Brit. chap.* 11. *ſect.* 5. 2 *Inſt.* 316, 381. 3 *Inſt.* 34, 209. *Bract.* 104. *chap.* 6. 137. *ſect.* 3. *Fleta* 39. *ſect.* 4. 47. *chap.* 31. *ſ.* 1. *Mir. chap.* 2. *ſect.* 9. *chap.* 5. *ſect* 1. *p.* 54. *Forteſc. de Laud. Leg. Angl. c.* 22.

If a priſoner die, whether by diſeaſe or accident, the coroner, upon notice of ſuch death, which notice the gaoler is obliged to give in due time, ought to reſort to the gaol, and there, upon view of the body, make inquiſition into the cauſe of the death. And if the death was owing to cruel and oppreſſive uſage on the part of the gaoler, or any officer of his, or, to ſpeak in the language of the law, *to dureſs of impriſonment*, it will be deemed wilful murder in the perſon guilty of ſuch dureſs: I ſay, *the perſon guilty of the dureſs*; becauſe, though in a civil ſuit the principal may, in ſome caſes, be anſwerable in damages to the party injured, through the default of the deputy, upon the principle of *reſpondeat ſuperior*, yet in a capital proſecution, the ſole object of which is the puniſhment of the delinquent, each man muſt anſwer for his own acts or defaults.

The inſtances of oppreſſion, which may fall within the rule of dureſs of impriſonment, are as various as a heart cruelly bent upon miſchief can invent. I will mention two which have lately come in judgment: A gaoler knowing that a priſoner infected with the ſmall-pox, lodged in a certain room in the priſon, confined another priſoner, *againſt his will*, in the ſame room. The ſecond priſoner, who had not had the diſtemper, *of which the gaoler had notice*, caught the diſtemper and died of it. This was very rightly held to be murder in the gaoler. 2 *Stra.* 856.

Another ſtraitly confined his priſoner in a low, damp, unwholeſome room, without allowing him the common neceſſaries of chamber-pot, *&c.* for keeping things ſweet and clean about him. The priſoner having been long confined in this manner, contracted an ill habit of body, which brought on diſtempers of which he died. This likewiſe was very rightly held

held to be murder in the party guilty of this dureſs. 2 *Stra.* 882. 2 *Ld. Raym.* 1574. *Barnard. K. B.* 358, 396. *Fitzgib.* 197.

Theſe were deliberate acts of cruelty, and enormous violations of the truſt the law repoſeth in its miniſters of juſtice. *Foſt. Cr. Law, chap.* 8. *ſect.* 25. *p.* 321.

After judgment, priſoner to be cloſe confined,

"After conviction and judgment, the gaoler to whom ſuch criminal ſhall be delivered, ſhall confine ſuch priſoner to ſome cell, or ſafe place within the priſon, ſeparate from the other priſoners; and no perſon, except the gaoler or his ſervants, ſhall have acceſs to ſuch priſoner, without licence under the hand of ſuch judge before whom ſuch offender was tried, or under the hand of the ſheriff or under-ſheriff." Stat. 25 *Geo.* 2. *c.* 37. *ſect.* 6.

And fed with bread and water.

"After ſentence, and until execution, ſuch offender ſhall be fed with bread and water only, (except in caſe of receiving the ſacrament of the Lord's ſupper, and except in caſe of any violent ſickneſs or wound, in which caſe ſome known phyſician, ſurgeon, or apothecary, may be admitted to adminiſter neceſſaries; the chriſtian and ſurname of phyſician, &c. and place of abode, being firſt entered in the books of ſuch priſon); and in caſe ſuch gaoler offend againſt, or neglect to put in execution, any of the directions hereby enacted, he ſhall forfeit his office, and be fined 20 *l.* and ſuffer impriſonment until the ſame be paid." *Ibid. ſect.* 8.

See *chap.* 4. Bailiffs, how puniſhable for oppreſſion, &c. towards priſoners in their cuſtody.

Diet.

Where the impriſonment is unlawful, the priſoner is not to pay for his diet. 14 *Vin. Abr.* 11. *pl.* 3.

Gaoler, &c. dies.

If a priſoner is in execution, and the gaoler or ſheriff die, he is in obeyance and cuſtody of the law. 3 *Co.* 72.

Fees to be paid.

A gaoler is not bound to deliver his priſoner, who is diſcharged by the court, until he pays his due fees.

Bar fee.

A priſoner acquitted of felony, the gaoler may take twenty-pence, which is called a bar fee.

Kalendar of priſoners.

Every ſheriff, bailiff of franchiſe, and every other perſon having authority of keeping gaols, or of priſoners,

ſoners for felony, ſhall certify the names of every ſuch priſoners in their keeping, at the next general gaol-delivery, in every county or franchiſe where ſuch gaol is, there to be kalendared before the juſtices of the delivery of the ſame gaol, whereby they may, as well for the King as the party, proceed to make delivery of ſuch priſoners according to the law, on pain of five pounds. 3 *H.* 7. 3.

Bond to be a true priſoner.

A bond given to be a true priſoner (as by law he ought) is good, and not within the ſtatute of 23 *H.* 6.

Condition.

The marſhal brings debt on bond; the condition was, If the above bounden *A. P.* now priſoner in the *King's Bench* in *Southwark*, do and ſhall from henceforth be and continue a true priſoner, in the cuſtody, guard, and ſafe-keeping of the above named *John Lenhall*, marſhal of the ſame priſon; and in the cuſtody, guard, and ſafe-keeping of his deputy, officers and ſervants, or ſome or one of them, until he ſhall be lawfully diſcharged, without committing any manner of eſcape or eſcapes, during the time of his reſtraint, then this preſent obligation to be void.

Pleadings.

The defendant pleads the ſtatute of 23 *H.* 6. of obligations made to the ſheriff *colore officii*. And further pleads, that at the time, and long before the plaintiff was marſhal, that *P.* at the ſame time was a priſoner at the ſuit of, *&c.* and that the defendant, together with the ſaid *P. pro eaſiamento & favore* to be ſhewed by the plaintiff to the ſaid *P.* made the ſaid bond, *&c.* The plaintiff replies, the bond was *pro meliori ſecuritate* of the ſaid plaintiff; that the ſaid *P.* ſhould not eſcape, and traverſeth the eaſe and favour. The defendant demurs.

And theſe things were reſolved:

1. That the marſhal of the *King's Bench* is within the words, *gaoler and keeper of priſons.*

2. Bonds made to gaolers for *eaſe and favour of priſoners* are void.

Bond to ſave harmleſs from eſcapes, is void.

3. A bond to ſave harmleſs from *eſcapes*, is within this ſtatute, and void; but a bond to continue a true priſoner is good: and there is no agreement, that it is for *eaſe and favour*, appears; but the contrary

rary rather; for the plaintiff in his replication hath traverſed it, and the defendant hath confeſſed the eplication to be true by his demurrer. *Saund.* 162. *Lutch* 23, 143.

The intention of the obligation was for *eaſe and favour*, and traverſing it hath taken it away. Plea.

Now when the defendant had ſuch iſſue offered, nd refuſed to join, but demurs; the defendant greed it was not for eaſe and favour. *Sid.* 283. Demurrer.

Note; *A little evidence in ſuch caſe would ſerve to rove eaſe and favour.*

A bond to the warden of the *Fleet* to be a true riſoner. The defendant, without pleading the ſtaute, ſaith, it was for *eaſe* and *favour*. The plainiff demurs. The plaintiff ſhould have traverſed the *aſe*. And judgment for the defendant. 3 *Keb.* Rep. 320. *pl.* 8. *Id.* 361. *pl.* 36. Warden.

Condition is, where *D. F.* is under his cuſtody *i. e.* of the obligee) upon arreſt, at the ſuit of the laintiff, in action of debt of 1400 *l.* upon bond by im to the plaintiff, and at the requeſt of the deendant he is permitted to go at large for ſix days. f therefore the ſaid *D.* before the 12th of *February*, enders himſelf priſoner to the ſheriff of *Middleſex*, t the plaintiff's ſuit, on action of 1400 *l.* and reain a true priſoner till he ſhall be diſcharged by onſent of the plaintiff. See the pleading. *Quære* he judgment. 2 *Jo.* 139. *Sid.* 132. To permit him to go at large for ſix days.

The condition of a bond was, if *Thomas Manngham* keep the ſheriff without damage againſt our ord the King, and one *T. P.* and at all times be the commandment of the ſaid ſheriff, as a true riſoner, and appear before the juſtices, *&c.* then he obligation to be void. Bond of one in execution.

The defendant pleaded the ſtatute of 23 *H.* 6. and hat the body of *Thomas Manningham* was in execuon upon a recognizance, and that the ſheriff made he obligation for the delivery of the ſaid *Thomas Manningham*, and demanded judgment *ſi actio, &c.* Concluſion of the plea, ill.

This is no good concluſion of the plea; he ought o have concluded, *iſſint nient ſon fait:* for the *ſtatute* ith it ſhall be void; and if it ſhall be void, then How it ought to be *iſſint nient ſon fait*,

it

it ſhall be void from the beginning, and then it is not his deed. And further, that he had not wiſely concluded his plea; for this ſpecial concluſion had ſtraitened the defendant ſo, that if the obligation be void for any other cauſe, the defendant ſhall not have benefit of it. And yet becauſe it appeared to the judges on the matter in law, that the plaintiff had no cauſe of action, the court gave judgment againſt him; for the obligation is void by the letter of the *ſtatute*, for it makes void obligations taken in another manner, which extends to avoid obligations for bailing thoſe which are contained in the ſecond branch, as thoſe in execution, *&c.* *Plowd.* 66, 67.

Yet judgment againſt the plaintiff.

Where *iſſint non eſt factum* ill.

But as for the concluſion of the plea, the condition was, that the defendant ſhould appear in *B. R.* to anſwer in a plea of treſpaſs, and ſatisfy the damages. The defendant pleads the ſtatute of 23 *H.* 6. that the bond was made for his enlargement, and *iſſint non eſt factum.* The plaintiff demurs ſpecially upon the concluſion of the plea, which ought to be judgment *Si actio*; and agreed the plea to be ill. *Al.* 85.

Judgment confeſſed on eſcape.

The defendant and *L.* were jointly bound for the true impriſonment of *W.* and there was a warrant of attorney to confeſs judgment on the eſcape of *W.* *Glyn* moved to ſet aſide the judgment, being a way for eaſe only, and judgment entered without trial of the eſcape. But *per cur'*, It is to be entered on action brought, which is brought, and the parties are at iſſue. But Sir *J. Lenthall* aſſigned his ſecurity to the creditor, which *per cur'* is well enough; and there appearing no fraud, they refuſed to ſet aſide the judgment. *Keb. Rep.* 815. *pl.* 93.

The rules of the *King's Bench* priſon.

The marſhal takes bond of one in execution to be a true priſoner, who eſcapes; action is brought againſt him, and well, for the bond is good. The *Marſhalſea* was ruled to be enlarged, and this ſhall be called *within the rules*; and if the marſhal takes bond to tarry there, it is good. *Latch* 143. *Pop.* 165.

To ſave from eſcapes.

But a bond to the marſhal, *&c.* to ſave harmleſs from eſcapes, is void, and within the ſtatute becau

becauſe it is not a bond that he ſhall continue a true priſoner. 2 *Keb. Rep.* 422. *pl.* 55. *Sid.* 383. *pl.* 15.

The marſhal ought not to take bond for chamber-rent; this is to come in in allowance fees. The warden, or other gaoler, cannot impoſe what rents they will on chambers. 3 *Keb. Rep.* 103. *pl.* 5. 133. *pl.* 57. 603. *pl.* 44. Bond for chamber-rent void.

A bond or covenant for fees is void; but a bond for true impriſonment is not void *prima facie*, without circumſtances, *&c.* 3 *Keb. Rep.* 133. *pl.* 44. Bond for fees.

A bond for chamber-rent is void by Common law; becauſe the party is reſtrained *contra voluntatem*, and ſhall be impriſoned till payment. Alſo the ſtatute extends to the marſhal only for ſuch bonds as they may take *Virtute officii*. *Latch* 10. So for meat or drink. Chamber-rent. Meat and drink.

Upon a ſtatute acknowledged, and extent ſued; the ſheriff takes bond of 20 *l.* for payment of 10 *l.* his fee; and this was before the *Liberate*. It is a void bond. 1. Becauſe he takes the bond before the *Liberate*. 2. He took his wages before he did his work. 3 *Keb. Rep.* 678. *pl.* 55. Fees. Note.

Debt was brought upon a bond made to a bailiff of a liberty to ſave him harmleſs, concerning goods which he had levied by a warrant; and as the goods of one *K.* and had delivered them to the defendant upon requeſt, who made claim to the goods, and returned *Nulla bona*, *&c.* Defendant pleaded in bar *Non damnificatus*. Plaintiff replies, and ſhews how, and defendant demurred. It was hereupon inſiſted for defendant, that the bond was againſt law, becauſe it was to ſave the plaintiff harmleſs from a falſe return: but on the other part it was inſiſted, that the bond was lawful; and to prove it ſeveral authorities were cited; and by the opinion of the whole court judgment was given for the plaintiff. *Lutw.* 593, 596. To ſave a bailiff of a liberty harmleſs for goods delivered.

Note; A promiſe is within the ſtatute, as well as a bond. But it is where the bond or promiſe is made by the priſoner himſelf, or ſome other for him. And therefore in an action on the caſe the defendant promiſed Promiſe within this ſtatute.

miſed the plaintiff, that if *B.* (a ſpecial bailiff at his nomination) arreſted *A.* at his ſuit on *Cap' ad ſatisfaciend'*, and ſuffered him to eſcape, he would not ſue the plaintiff; this is not within this ſtatute. *Leon.* 132.

Covenant. But *Hobart* in *Norton Sim's* caſe ſaith, covenant is not within this ſtatute; that is, becauſe it was not a bond (for performance) made in the behalf of a priſoner, as *Beaufage's* caſe is. *Hob.* 13.

Promiſe void. A promiſe made to a gaoler to ſuffer a priſoner to go at large, is void. 2 *Bulſtr.* 213.

Where the ſheriff is not to take 60, or 40 *l.* bail. By the ſtatute of 13 *Car.* 2. *ſt.* 2. *c.* 2. perſons arreſted by proceſs out of the *King's Bench* or *Common Pleas*, not expreſſing the cauſe of action in the writ, bill or proceſs, and which are bailable by the ſtatute of 23 *H.* 6. *c.* 10. ſhall give bail-bond not exceeding the ſum of 40 *l.* and upon appearance at the return, he ſhall diſcharge ſuch bail-bonds. And if the plaintiff do not declare before the end of the next term after appearance, then he ſhall be nonſuit, and judgment and coſts ſhall be againſt him.

Exception. But this ſtatute extends not to arreſts upon *Capias utlagat'*, *Attachment* or *Reſcous*, *Contempt* or *Privilege*; nor to popular action, or action on any penal law (except for tithes), indictment, or information.

Action lies. Now if the ſheriff in ſuch perſonal actions do take a bond of 150 *l.* (where it ought to be but 40 *l.*) the party ſhall have an action upon the ſtatute againſt

Yet bond good. the ſheriff; but the bond is not void. This was the caſe of a coroner. 2 *Keb. Rep.* 400. *pl.* 3. *Id.* 287. *pl.* 61.

And therefore, where it ſaith, the ſtatute doth not reſtrain him from any ſum, is good law; but

Caution. with this caution, that action lies againſt him if he exceed 40 *l. de placito debiti* generally, upon this late ſtatute. *Cro. Jac.* 286.

CHAP.

CHAP. XIII.

Execution.

IF a man recover damages in action on the caſe against *J. S.* in the *King's Bench*, the ſaid *J. S.* being *in cuſtod' mareſchal'*; yet he ſhall not be in execution on this judgment, although it be within the year, before prayer of the plaintiff; for the marſhal may not take notice of every judgment againſt every priſoner; but upon prayer of the plaintiff, a *Committitur* ſhall be entered upon the roll, and then he is in execution, but if the defendant, being taken in execution, be brought in by *Habeas corpus*, and then an entry of the *Committitur* is made in the book of the office, it is good. 2 *Roll. Rep.* 104. *pl.* 43, 73. *pl.* 11. *Cro. Jac.* 364. *pl.* 3. *Leon.* 58. 73. 74.

Prayer of the plaintiff.

Where a *Committitur*.

If a man recover in *G. B.* debt and damages againſt *J. S.* and hath judgment, although that *J. S.* be a priſoner in the *Fleet* for other cauſes (which is the priſon of the *Common Bench*), and the warden informs the court of it, and the court commands him to retain him in execution until ſatisfaction of the judgment; yet he is not in execution, becauſe he is not brought to the bar by *Habeas corpus*, and viewed, and demanded of the priſoner, if he be the ſame perſon, who is condemned or not; and it is the office of the court to oppoſe him. *Dy.* 13, 14. 1 *Eliz.* 506. *pl.* 63. So if the warden inform the court of *Chancery*, that *J. S.* (which is a priſoner there on a judgment) is in his ward for certain cauſes, for which the court commands the warden to return him in execution, until ſatisfaction of the judgment; *J. S.* is not in execution upon the judgment, becauſe this was not done at the requeſt of the plaintiff, but without his prayer, for it may be he will have another execution. *Dy.* 63, 306.

Hab. corp. to bring priſoner into court.

At the prayer of the party, or not.

Marſhalſea. In debt againſt *J. S.* if the defendant be taken upon a *Latitat*, and committed to the marſhal for default of bail, and after the plaintiff recovers againſt him, he continuing in priſon; yet he ſhall not be in execution for this judgment before the prayer of the plaintiff. 10 *Vin. Abr.* 572. *pl.* 1.

On *Cap. utlagat'* within a year. If a man recover in debt, and outlaw the defendant after judgment, and after within the year, the defendant is taken by *Cap' utlagatum*, he ſhall be in execution for the plaintiff before prayer, becauſe the outlawry was at the ſuit of the party. 5 *Co.* 88. *Cro. El.* 706. *pl.* 28. *Mo.* 566. *pl.* 772. See *Salk.* 280. 5 *Mod.* 201. *Fitzgib.* 265. *Bridgm.* 7

After the year. 7 *Mod.* 65. Otherwiſe it is, if he be taken in execution after the year, becauſe in that caſe he may not have any *Capias* againſt him. *Cro. Eliz.* 467. See

In debt after judgment. 5 *Mod.* 200. But if a man outlaw the defendant in debt after judgment, and after within the year the defendant is taken by *Cap' utlagatum*, although he be in execution for the plaintiff *prima facie*; yet he may make election, that it ſhall not be an execution for him. *Cro. El.* 850. *pl.* 6. See 5 *Mod.* 201. *Mo.* 598. *pl.* 817.

Scire fac'. If execution by default be awarded in a *Scire fac'* upon a judgment in debt, and the defendant for years after was in the *Fleet* for other cauſe; and by *Habeas corpus* he was brought up to the *Common Bench*, and being oppoſed by the court, if he were the perſon who was condemned, *ut ſupra*, and grants it, he ſhall be committed in execution at the

Though after the year and day. prayer of the plaintiff as it ſeems, though it be after the year and day. *Dy.* 147, 214.

Error and no bail found. If *A.* recover againſt *B.* by judgment in the *King's Bench*, and upon this *B.* renders himſelf to priſon, and after brought a writ of error, and had a *perſedeas*; yet after, upon prayer of the plaintiff, the court may commit him in execution, although the record be removed; foraſmuch as he had not found bail upon his writ of error. 10 *Vin.* 575. *pl.* 7.

Sheriff may break open houſe on *Habere fac' poſſeſſionem.* Upon recovery the ſheriff may break open the houſe, and deliver it to the plaintiff; for the

ſaith, *fac' ſeiſinam* or *poſſeſſionem.* And after judgment, it is not the houſe of the defendant in right. 4 *Bac. Abr.* 455.

Upon a *Capias ad ſatisfaciend'*, the ſheriff may not break open any man's houſe to make execution; but in all caſes, when the door is open, he may enter to make execution of body or goods. 4 *Bac. Abr.* 454. *Ca. ſa'.*

In all caſes where the king is party, ſo in *Hue* and *Cry*, if no door be open, the ſheriff may break open the houſe to take him, or to do execution or other proceſs; as upon a *Cap'* (*a*) *utlagat'*, or upon contempt: but he ought firſt to ſignify the cauſe of his coming, and requeſt the owners to open the door, but not to break open any man's houſe by night. 4 *Bac. Abr.* 454. *Yelv.* 28. 5 *Co.* 91. *Cro. El.* 908. 4 *Leon.* 41. *pl.* 111. *Cro. El.* 909. 14 *Vin. Abr.* 316. *Cro. El.* 742. *pl.* 17. *Hue* and *Cry.*

Upon a *Fieri fac'*, or *Extendi fac'*, the ſheriff may not enter into the houſe of any, the door being ſhut, nor draw a latch, no not after requeſt and denial; yet though the ſheriff be a treſpaſſer in breaking open the houſe by *Fieri fac'*, the execution is (*b*) good. 4 *Bac. Abr.* 454. *Fi. fa', &c.*

The houſe of any one is not privileged but for himſelf and his family, and his own proper goods, not to protect any who flie there, or the goods of another conveyed there; and in ſuch caſe after requeſt the ſheriff may break open the door; ſee *Foſt. Cr. Law* 319. 14 *Vin. Abr.* 316. 19 *Vin. Abr.* 432. 4 *Bac. Abr.* 455. One man's houſe is no privilege for another man's goods, *&c.*

The ſheriff, *&c.* under colour of a *Latitat* and an outlawry, made a violent entry with drawn ſwords, *&c.* where the outward door was open, and no oppoſition made, broke open the chamber door, ar- Violence on a *Latitat* and *Cap' utl'.*

(*a*) Though on meſne proceſs, and at the ſuit of the ſubject. 2 *Show. Rep.* 87. *pl.* 78.

(*b*) But it ſeems to be the modern practice in ſome caſes, on complaint by affidavit, to diſcharge ſuch execution, and to grant an attachment againſt the officer. 4 *Bac. Abr.* 454.

reſted the defendant, took appearance upon the *Latitat*, and 4*s*. for ſuing out a *Superſedeas* upon the outlawry, and ſo diſcharged him: and the ſheriff was fined 200 *l*. for the unneceſſary terror and outrage, and for not ſignifying that he was ſheriff, that the door might have been opened without violence, but eſpecially for diſcharging the plaintiff upon the *Cap' utlagat'*. *Hob.* 263, 264.

Sheriff fined 200 *l*.

Upon a *Fieri fac'*, a barn which ſtands in the field may be broken by the ſheriff, becauſe it is not part of the dwelling-houſe, and there needs no requeſt; *aliter* had the barn been adjoining, and parcel of the houſe. *Sid.* 186. *pl.* 11. *Bulſt.* 146. *Keb. Rep.* 698. *pl.* 22. 4 *Bac. Abr.* 455. 19 *Vin. Abr.* 432.

Barn in the field.

But though a ſheriff cannot break open a houſe, being to take execution by *Fieri fac'*; yet when the door is open that he enters, then he may and ought to break (*a*) open the door of an entry or chamber which is locked, or break open any cheſt which is locked and take the goods, and if he do not, an action on the caſe lies againſt him. *Brownl. Rep.* 50. 2 *Show. Rep.* 87. *pl.* 78. 4 *Bac. Abr.* 456. *Comb.* 17, 327.

Where on *Fi. fa.* he may break doors and locks.

Where the execution is lawfully begun, there the ſheriff or his officers may break the houſe to make execution; otherwiſe when it is not lawfully begun. If one be arreſted by the ſheriff, and he eſcapeth to his own houſe, and the ſheriff purſues him and breaks open the doors of his houſe, and takes him again, the party ſhall never take benefit of this his own wrongful eſcape. 4 *Bac. Abr.* 556.

When execution is lawfully begun.

Eſcape.

Two of the under-ſheriff's bailiffs entered into the houſe, the door being open, to make execution of the goods, and the plaintiff ſhuts the door upon the bailiffs, and impriſoned them for two hours; the ſheriff may break open the houſe to reſcue his bailiffs. *Cro. Jac.* 555. See 19 *Vin.* and 4 *Bac.* as above.

Bailiffs ſhut up.

The ſheriff was fined for breaking open an houſe, and ruſhing in with ſword drown, the door being half open, on private proceſs.

Private proceſs.

(*a*) That this muſt be after requeſt and refuſal. *Palm.* 54.

If

If a bankrupt convey his goods to his neighbour's house, the commissioner's serjeant may not, but the sheriff may break open the house, because he is a sworn officer of the king's. *Goodwin's Law against Bankrupts* 65. Bankrupt's goods.

Upon a commission of rebellion out of *(a) Chancery*, the sheriff may break open the house to apprehend the party therein, whether in his own or another's house. *Cromp. fo.* 47. Commission of rebellion.

The sheriff may take the *Posse Comitatus* to do execution, *per statute W.* 2. *cap.* 39. and he may take it *post vel ante querimoniam*, but he must take it after resistance, and not before; for *sequi debet potentia justitiam non præcedere.* 2 Inst. 445. *Posse Comitatus.*

But suppose the sheriff cannot do execution by the *Posse Comitatus*, then saith the book, *Keb. Rep. pl.* 91, 117. *pl.* 22. he ought to acquaint the deputy-lieutenants of the county, and if they assist not, he must acquaint the king and council, and yet the sheriff shall not be amerced, if he return he cannot do execution; but in *Godb.* 79. upon a resistance of execution, the council-table refused to meddle in it, because the court of *King's Bench* ought to see their own judgment executed: and a writ was prayed to the high-sheriff with a special rule, that the high-sheriff should execute it himself, which the court granted, and a tipstaff to fetch the under-sheriff up to return his writ, which is better than an attachment which is returnable by itself. *Goulsb.* 79. *pl.* 14. *Posse Comitatus.* Special writ to the high-sheriff.

And it seems the sheriff is bound to do and make executions at his peril, and to that end may take the *Posse Comitatus.*

If recognizance of bail be taken by a judge of the *Common Pleas* at *Serjeants Inn* in *London*, upon an original brought in *London*, and he certifies this into the court of *Common Pleas*, and it is there inrolled, but it appears on record, that it was taken To what sheriff.

(*b*) But for an attachment for a contempt, &c. issuing out of *Chancery*, it is said the officer cannot break open the door. 4 *Bac. Abr.* 455. but *quære.*

as before; a *Fieri fac'* may be awarded upon this recognizance to the ſheriff of *London* where the *Capias* was, for there was the commencement of it, and alſo the *Scire fac'* may be awarded to the ſheriff of *Middleſex* where the recognizance was inrolled. 19 *Vin. Abr.* 281. *pl.* 5.

Scire fac' to the ſheriff of *London* or *Middleſex* on recognizance Bail.

Weſt. 2. *c.* 18. ſaith, *Vic. ei liberet medietat' per rationabile extent'*, (*viz.*) *per inquiſition'*, and the ſheriff is ſworn, and a ſerjeant at mace is not ſworn to take a jury; yet the ſtatute extends to every other immediate officer to any of the king's courts of record, and ſo a ſerjeant may execute this, and a *Fieri fac'* alſo, and this ſtatute couples *Elegit* with a *Fieri fac'*, and limits both to be executed by the ſheriff, or his officer, but in waſte and rediſſeiſin, the ſheriff muſt do it in perſon. 4 *Co.* 65, 66.

Serjeant at mace may execute *Elegit*.

The writ to levy damages in waſte to whom to be directed.

If a man recover damages in action of waſte in one county, the writ to levy them ſhall iſſue to the ſheriff of the ſame county where the action was firſt brought, and not to any other; but if the ſheriff return he had nothing, he ſhall have execution by *Teſtatum*, into any other county where the recoverer will.

Where *Ca. ſa.* lies.

It lies againſt ſuch perſons againſt whom a *Capias* doth lie in the commencement of a ſuit, as debt, account, action on the caſe, treſpaſs *Vi & armis*, annuity and covenant; but it lies not for a recovery of damages in a real action.

Where no other execution.

If one be in execution by *Ca. ſa.* which is returned, no other execution can be ſued againſt him, his lands and goods, 21 *Jac. c.* 24. but it is otherwiſe after his death.

A *Capias* is to have the body of ſuch an one ſuch a day, and the ſheriff brings the body, or returns the writ before the day, it is good. *Winch* 7.

Preſently in execution.

If one be delivered in execution by the king's writ, he is preſently in execution and in cuſtody, without laying hands on him to arreſt him; by *Coke* C. J.

Sheriff takes one by a falſe name.

The ſheriff is to be excuſed for taking one by a falſe name in execution; and if the judges admit this

this falſe name, yet the judicial writ ought not to be examined by the ſheriff. *Lane Rep.* 49, 52.

One in execution may not be diſcharged by *Habeas corpus* or writ of *Privilege*, he ſhall not be ſet at large. *Sid.* 289. *Id.* 90. May not be diſcharged.

The ſheriff may execute proceſs of execution againſt one attaint of felony and in cuſtody, if he pleaſe; and if the felony be pardoned, or the attainder reverſed, he ſhall be in execution. 11 *Vin. Abr.* 23. *pl.* 1. See *Foſt. Cr. Law* 62. *Salk.* 500. 7 *Mod.* 153. 2 *R. Raym.* 848, 1572. 2 *Stra.* 873. Execution againſt one attaint of felony.

If a man recovered debt againſt *B.* and levy part of the debt by *Fieri fac'*, which is returned; yet he may take the body of *B.* by a *Cap' ad ſatisfac'* for the reſidue. *Hob.* 58. *Lev.* 92. 2 *R. Raym.* 1451. *Str.* 226. *Ca. ſa.* after a *Fi. fa'.*

Though the king's debtor be in execution by his body or his land, yet the ſubject may take him in execution by his body; for the ſtatute of 15 *Ed.* 3. 13. is to be intended of executions of lands and goods, and not of the body, which is *tout a tout. Hob.* 160. Though at the king's ſuit.

Sheriffs of *Briſtol* took the plaintiff by a *Cap' ad ſatisfac'*, and detained him in priſon until the party defendant, and now plaintiff, paid the money to the ſheriff. *Per Cur'*; This was contrary to his warrant, which is, *Ita quod habeas denarios in curia*; and becauſe he did not ſo, he is chargeable to him that was in execution. *Hetl.* 122.

A *Capias ad ſatisfac'* was returnable *Quinden' mart'*, and that writ was returned *Album breve*, and a *Teſtatum* thereupon, and the defendant taken by it. The *Teſtatum* iſſued out accordingly, becauſe the *Capias* was not returned. And the court granted a *Superſedeas. Brownl.* 40. *Return' album breve.* *Superſedeas.*

Debt on judgment in *B. R.* the defendant confeſſeth the judgment, and execution above a year; and not being able to find the plaintiff, he paid the money to the marſhal. Plaintiff replies, he did not abſent voluntarily; and the defendant demurs. *Judgment pro querente.* The ſheriff on *Cap'* cannot re- One in execution on *Cap' ad ſatisfac'* ought not to pay the money to the gaoler.

ceive the money as on *Fieri fac'*, nor is the party remediless, for he may pay his money into court. *Leon.* 140. And have an *Audita querela*; but the plaintiff were remediless should the gaoler be insolvent.

Defendant on indictment and conviction of a disorderly house, was committed to the marshal for payment of a fine, but before actual imprisonment the fine was paid to the marshal; yet resolved, this is no good payment, and the party was forced to pay it over again. *Per Jones*, It is doubtful whether voluntary payment to the sheriff on *Fieri fac'*, before execution of his goods, be pleadable in discharge (but that is adjudged it is so), much less on a *Cap'* which is *ad satisfaciend'* the party in court, and he is committed *quousque satisfaciat parti*, not the sheriff. 3 *Keb. Rep.* 788. *pl.* 43.

Verdict. If the issue be, whether the sheriff took *J. S.* and kept him in prison under his custody in execution by force of a *Capias ad satisfaciend'*; and the jury found he took him by force of an *Alias Cap' ad satisfaciend'*; although it is not found he kept him in execution for the debt and damages aforesaid, according to the issue; yet this is a good special verdict. For it shall be intended; for the consequence is necessary of that which is found, because he cannot take him, but he ought to be in execution. *Hob.* 82. 11 *Vin. Abr.* 28. *pl.* 22.

Intendment.

How execution upon a *Ca. sa.* shall be sued upon a judgment against two or more, and though there shall be but one satisfaction, yet the sheriff may take the bodies of all in execution. 5 *Co.* 86.

Capias utlagat'. One taken on a *Capias utlagat'* after judgment after the year, is in execution of the party's suit. *Sans* Prayer. *Salk.* 319. *Comb.* 373.

Goods pawned not to be taken in execution. Goods pawned shall not be taken in execution for the debt of him which pawned them, during the time they are pawned. *Kitchin* 226.

Furnace annexed, not. The sheriff upon a writ of *Execution* may not seize and sell to the party a furnace annexed to the freehold; for this would be waste in the lessee. 10 *Vin. Abr.* 560. *pl.* 1. *Cro. El.* 374. *pl.* 70, 71.

Fats,

Fats, Coppers, Tables and partitions were ſet up by a ſope-boiler for the convenience of his trade, and who alſo paved the backſide, &c. and theſe were all taken in execution by the ſheriff on a *Fi. fa.* and it was held good by *Holt* Ch. Juſt. *Salk.* 368.

Fats, Coppers, Tables, and partitions may.

The goods eccleſiaſtical of clergymen are not to be taken by the ſheriff, but by the biſhop, upon a *Levari fac'*, on a recognizance. 2 *Inſt.* 472.

Bona eccleſiaſtica. Not.

If one ſell any goods to another depending an action againſt him, theſe goods afterwards ſhall not be put in execution; for they were lawfully bought, (if *bona fide*, and for valuable conſideration.) But if a *Fieri fac'* be directed to make execution of goods, and after the *Teſte* of the writ, and before the ſheriff executes it, the party ſells his goods *bona fide*, they may nevertheleſs be taken in execution; (*aliter* by the ſtat. of *Frauds* and *perjuries*). *Cro. El.* 174. *Mo.* 21. *pl.* 72.

Goods ſold pending the action.

29 *Car.* 2. *c.* 3. perpetuated by 1 *Jac.* 2. *c.* 17. *ſ.* 5.

By ſtat. of *Frauds* and *Perjuries*, no writ of execution ſhall bind the property of goods, but from the time of its delivery to the ſheriff, under-ſheriff, or coroners; who upon receipt thereof (without fee) ſhall indorſe on the back thereof the day of the month and year when they received it.

Goods bound only from delivery of the writ.

29 *Car.* 2. *c.* 3.

If the party dies after the writ of *Execution* awarded, and before it be ſerved, the ſheriff may ſerve it of the goods in the hands of the executor. For by the execution awarded the goods are bound, and the ſheriff needs not take notice of his death. *Leon.* 144, 145.

Goods in the hand of the executor.

The ſheriff may have *Trover* or *Treſpaſs* at election, againſt him that takes them away. *Sid.* 438. *pl.* 3. *Ventr.* 52, 53. *Lev.* 282. 2 *Saund.* 47. *Mod.* 30. *pl.* 75.

The plaintiff being ſheriff ſeized the goods in execution by force of a *Fieri fac'*, and after (and before the ſale of them) the defendant takes them and carries them away, and converts them to his own uſe; and the plaintiff (being ſheriff) brings his action of *Trover*; and adjudged the action well lies. By the ſeizure of the goods in execution the ſheriff

Upon ſeizure of goods property is in the ſheriff.

hath a property in them, ſo that he may reſeize them and ſell them, as well when he is out of his office as before. 2 *Saund.* 47. *Mod.* 57. 2 *Saund.* 344. *Cro. Jac.* 73. *pl.* 2. *Mo.* 757. *pl.* 1045. Adjudged that the ſale was good, becauſe the ſheriff was chargeable with the value. *Yelv.* 44. S. C. adjudged *contra*, that the ancient ſheriff cannot ſell the goods, but it is not ſtated there, that the ancient ſheriff had paid any part of the money recovered. 2 *Saund.* 47. cites S. C. as adjudged in *Mo.* 757. *Cr. Jac.* 73. *Dalt. Off. Vic. cap.* 2. *fo.* 19. contrary to the *Rep.* of *Yelv.* 44. and ſays that the roll of this caſe is in *Paſch.* 44 *El. Rot.* 318. S. C. cited 2 *Saund.* 345. and *Hale* Ch. J. ſaid, that the roll of it is in *Paſch.* 44 *El.* 618. *Mod.* 31. cites S. C. —S. C. cited by *Gould* J. 2 Ld. *Raym. Rep.* 1073. S. C. cited *Vent.* 319, 320. but adds, (*ſed nota*, the court ſaid that if the old ſheriff had returned, that the goods had remained in his hands *pro defectu emptorum*, a *Diſtringas* ſhould have gone to have had them delivered to the new ſheriff, and then a *Venditioni exponas* ſhould have gone to the new ſheriff. See *Yelv.* 44.) *Salk.* 322. *pl.* 10. reſolved that the old ſheriff has not only authority, but is bound and compellable to proceed in the execution; for the ſame perſon that begins an execution ſhall end it, and a *Diſtringas nuper vicecomitem* lies; of theſe there are two ſorts, one is to diſtrain the old ſheriff to ſell and bring in the money, and the other is to ſell and deliver the money to the new ſheriff to bring into court; which plainly ſhews his authority continues by virtue of the firſt writ. 6 *Mod.* 290. S. C. held accordingly. 11 *Mod.* 35. S. C. If one ſheriff levies, the ſucceeding ſheriff ſhall not go on with it, but the old ſheriff; for after goods are once levied, a *Superſedeas* cannot ſtop the completion of the execution which a writ of error only can do. 11 *Mod.* 35. *pl.* 6. *Barnard. K. B.* 81. accordingly. 10 *Vin. Abr.* 569. in notes.

When ſheriff becomes debtor to the plaintiff.

After the debt levied, the ſheriff is debtor to the plaintiff, and capable of a releaſe from him; the action ceaſing againſt the defendant is *ipſo facto* by the law

law transferred to the ſheriff, having both the judgment to make it a debt, and the levy to make him anſwerable; and though action of *Account* will properly lie in this caſe, yet the ſame will many times bear both actions, though the monies be received by *outer mains*, or the like. *Hob.* 206, 207.

If a ſheriff levy money upon a *Levari facias*, upon a recognizance at the ſuit of *J. S.* and returns the writ ſerved; *J. S.* may have debt againſt the ſheriff's executors. But in that caſe the plaintiff demurred to the defendant's plea, and concludes ill. *Rol. Abr.* 418. Upon a *Levari facias.*

The plea was grounded upon a releaſe, and ſhould have demanded judgment if the defendant ſhould be admitted to plead a releaſe made after the ſheriff had made his return, and in ſuch caſe action lies againſt the ſheriff's executors, although it does not appear that the *Fieri fac'* on the judgment was returned; for this is not material, inaſmuch as the party is diſcharged by payment of it without return: and this is not grounded on a perſonal *Tort*, but on a contract in law; and this is not a ſimple contract, but principally grounded upon a record. *Mar.* 13. *pl.* 33. *Jo.* 430. *pl.* 2. *Cr. Car.* 539. *pl.* 3. *Hob.* 206. *Brownl.* 51. *Hut.* 11, 12. *Mo.* 886. *pl.* 1224. *No.* 22. 2 *Show.* 281. *pl.* 271. 2 *Show.* 79. *pl.* 63. Action againſt the ſheriff, or his executor, for levying money on the *Levari*, and not returning the writ.

Action on the caſe was brought by executor againſt the ſheriff, who had levied the debt in execution, and did not return the writ; and after the teſtator died, and the plaintiff for that *Tort*, *in vita teſtatoris*, and for the loſs which came to him, brought the action. The *quære* was, if it lies by the executor, becauſe it is a perſonal wrong to the teſtator: and the court was divided. *Cro. Car.* 297. But the better opinion is, that the action lies againſt the ſheriff. Action by executor, for levying the debt, and not returning the writ *in vita teſtatoris.*

If the ſheriff in executing a *Fieri fac'* doth not miſbehave himſelf, he ſhall not be charged in debt or *Scire fac'* unleſs it appear by his return that he had the monies in his hands. 10 *Mod.* 53. As if the ſheriff return, *Cepi & ſeiſiri feci in manus meas bona & catalia* *Scire fac' ſur Fieri fac'.*

catalla ad valentiam 160 *l. quæ remanent in manibus meis ab defectum emptorum.*

Where it lies, and where not.

On this return the ſheriff ſhall not be charged in debt or *Scire facias*, becauſe it appears not that he has miſbehaved himſelf. But if upon the *Fieri fac'* the ſheriff return, that he hath levied the money, and doth not pay it to the plaintiff at the return of the writ, the plaintiff may have a *Scire fac'* againſt the ſheriff, to ſhew cauſe wherefore the money ſhould not be levied of the ſheriff. 2 *Saund.* 344, 345. *Hut.* 32.

Fieri fac', and reſcue.

So if in *Fieri fac'* to levy 200 *l.* debt, &c. the ſheriff returns, that he had made a warrant to his bailiff, who had ſeized divers goods of the ſaid *S. ad valentiam* of 160 *l.* and that they were reſcued out of their cuſtody; *ita quod* he could not levy the debt, and that the ſaid *S. nulla alia habuit bona.* The plaintiff may bring a *Scire fac'* to have execution againſt the ſheriff for the monies, according to the value returned, and the ſheriff ſhall pay it out of his own proper goods. *Andr.* 247. *pl.* 260. 2 *Saund.* 341. *Sav.* 123. *pl.* 192. *Cr. El.* 208, 209. *pl.* 4.

Old ſheriff. *Scire fac'* againſt the old ſheriff to pay the money levied in execution.

With this agrees 9 *Ed.* 4. 50. *Scire fac'* 21. if the ſheriff return upon a *Scire fac'*, that he hath levied the money, and hath the ſame in court, but hath not the money at the day, and then a new ſheriff is choſen; in this caſe it being on record, that the money is levied by the old ſheriff, a *Scire fac'* ſhall iſſue againſt the old ſheriff to pay it: and if he cannot, or will not diſcharge and pay the money, the party ſhall have a *Fieri fac'*, or *Elegit* againſt the ſheriff, of his proper goods.

Motion to alter the return.

On *Fieri fac'* the ſheriff ſeized ſeveral goods which were mercery ware, and returns *Fieri fac' ad valentiam*, which return was filed. The ſheriff appears, and prays to amend the return, becauſe ſome of the goods were impaired by lying, and he could not get buyers.

Not amendable.

Per cur': 1. Such return may not be altered, after it is returned and filed.

2. Where the ſheriff returns *Fieri fec' ad valentiam*, this ſhall be no excuſe of his payment of the money,

money, becauſe he might have returned he had ſeized the goods, and that they remain *pro defectu emptorum*, and then he may be excuſed, if the *Bona peritura* periſh. *Sid.* 40. *Pro defect' emptorum.*

Therefore the ſheriffs were ordered to pay the money, and to anſwer *interrogatories* for their contempt, having been ordered to bring in the money, and not appearing till a tipſtaff was ſent. Ordered to pay.

As to amendment of returns, matter of form in a return is amendable, but not matter of fact, which goes to juſtification of impriſonment. 2 *Bulſt.* 259. Amendment of return.

If the ſheriff have a *Fieri fac'* againſt a man's goods, and before execution he pay him the money, in this caſe he cannot do execution after; and if he do, an action of treſpaſs or falſe impriſonment lies againſt him. Treſp. *verſus* vicount.

The ſheriff, upon a *Fieri fac'*, cannot deliver the defendant's goods to the plaintiff in ſatisfaction of his debt, but muſt return the execution in court. *Cro. Eliz.* 504. *Noy* 56. Cannot deliver goods to the plaintiff.

Action on the caſe was brought againſt the ſheriff, for fraudulent omiſſion of execution of goods, that were *in conſpectu ſuo*; but he ſaith not in his declaration, that he knew them to be the goods of the defendant in that action. And for this omiſſion after verdict, judgment was arreſted by *Twiſden* and *Windham*. *Keb. Rep.* 946. *pl.* 7. the giſt of the action is the fraud, which cannot be without notice, which is now wrapt in the verdict, though it could not be pleaded, the ſheriff being bound to take notice whoſe goods they are. For not ſeizing goods in *conſpectu ſuo.*

On *Fieri fac'* againſt *J. S.* who has the goods of *A.* in his poſſeſſion, if the ſheriff ſells theſe goods, trover or treſpaſs will lie againſt him; and to prevent this, all the ſheriffs of *England* take ſecurity. *Keb. Rep.* 693. *pl.* 10. *Sid.* 83. *pl.* 3. Where ſheriff ſells a ſtranger's goods.

In debt againſt the ſheriff, the plaintiff declared upon a judgment obtained againſt *J. S.* and had ſued out a *Fi. fa.* and delivered it to the defendant, who by virtue thereof had levied the money. The defendant pleads *nihil debet*, and adjudged a good plea. And this difference was taken, that where the writ has If ſheriff levies money on a *Fieri facias*, and returns *Fieri feci*, debt will lie againſt him.

has not been returned, the plea is good, becauſe it is matter of fact, whether he has levied the money or not; *ſecus* where the writ is returned *Fieri feci*. 12 *Mod.* 604.

That he delivered ſuch goods to the ſheriff, &c.

In *Detinue* the plaintiff had judgment, and brought *Scire fac'* to have execution. Defendant pleads, that upon a *Diſtringas* to the ſheriff on that judgment, he delivered ſuch goods to the ſheriff, and for the reſidue, that they were appraiſed at ſo much by inquiſition taken by the ſheriff, and that he delivered the money to the ſheriff; but he doth not aver this matter to be returned by the ſheriff. It is a good plea, for otherwiſe the defendant ſhould be prejudiced, for he might have twenty ſeveral executions ſerved againſt him upon one judgment; and he ſhould be put to his remedy againſt the ſheriff only, who may be inſolvent, and it is a leſs miſchief to enforce the plaintiff, if his plea be true, to take his action for it againſt the ſheriff; and if it be not true, to take iſſue thereupon. *Cro. Eliz.* 390.

Where the plaintiff ſhall have a new *Fieri fac'* or not.

Now if the ſheriff levy goods by force of a *Fieri fac'*, and delivers them not to the party, nor returns the overplus, the plaintiff may have a new *Fieri fac'*, becauſe a record ſhall not be avoided by a matter in fact; but by the taking the goods of the defendant to the value of the debt by the ſheriff, the defendant is diſcharged, although the ſheriff do not ſatisfy the plaintiff: therefore he ſhall not have a new execution. 2 *Rol. Rep.* 57. *Rol. Abr.* 902. Q.

New execution for ſurplus.

Where a ſheriff on a *Fieri fac'* returns, that he had ſeized goods of leſſer value which were reſcued, and that *nulla alia bona*, &c. the plaintiff may not ſue a new execution, but only for the ſurplus beyond the vlaue of the goods reſcued. 2 *Saund.* 344.

May not be ſtopped in ſheriff's hands.

If the ſheriff levy money in execution, the Lord Keeper cannot order the money ſhall ſtay in the ſheriff's hands, or order that the plaintiff ſhall not call for it. *Mar.* 54.

Venditioni exponas.

If the ſheriff ſhall return *Fieri feci, ſed non invenit emptores*, then a *Venditioni exponas* ſhall go out.

Debt tendred.

If the defendant tenders the debt, it is wrong for the ſheriff to ſell the goods. *Keb. Rep.* 655. *pl.* 34.

If goods remain in the ſheriff's hands for default of buyers, and there periſh, the ſheriff ſhall not be chargeable; but if the ſheriff refuſes a buyer, action on the caſe lies. 2 *Keb. Rep.* 464. *pl.* 48. *Sid.* 483. *pl.* 18. Buyer refuſed.

The ſheriff took the defendant's goods in execution by *Fieri fac'*, and before ſale the record was removed by a writ of error into the *Exchequer Chamber*, and a *Superſedeas* awarded; and the ſheriff returned upon the *Fieri fac'*, Seizure of the goods, and that they remained in his hands *pro defectu emptorum*; and he alſo returned, that a *Superſedeas* was awarded, *&c.* And hereupon it was prayed for the defendant, that he might have reſtitution of his goods. *Cro. Eliz.* 597. After ſeizing the goods, and before ſale, a *Superſedeas.*

But, *per curiam*, Although this record be removed, and notwithſtanding the *Superſedeas* awarded, in regard it came not to the ſheriff till he had begun to make execution, as appears by his return, that a *Venditioni exponas* ſhall be awarded to perfect it. *Sed non allocatur*, But a *Venditioni exponas.*

And although the plea-roll be removed, yet it ſhall be awarded on the return of the *Fieri fac'*, which remains ſtill in the office. But as it is in *Keb. Rep.* 324. *pl.* 51. if the error were allowed before ſeizure, then, though the ſheriff be unpuniſhable in that caſe, yet *Superſedeas*, notwithſtanding execution done, ſhall go, *quia improvide*, *&c.* *Aliter*, if error before ſeizure.

And *per curiam*, If the goods be ſold, the money may be brought into court to be reſtored to the party; but if not, the goods may in *ſpecie* be reſtored. Goods reſtored in *ſpecie.*

But if before ſale a *Superſedeas* comes to him, if the ſheriff after ſells the goods without a writ of *Venditioni exponas*, this is void. But *Holt* Chief Juſtice ſaid, that the ſheriff might ſell notwithſtanding. 6 *Mod.* 293. *Superſedeas* before ſale.

The ſheriff ſells bricks for 7 *s. per thouſand*, on the place, for which he might have 16 *s. per thouſand.* The queſtion was, who ſhould pay the overplus, the buyer or the ſheriff's executors? And *per curiam*, The ſheriff's executors ſhall pay the overplus, Where the goods are under ſold,

plus, the ſale being abſolute, and not an agreement to ſell. 3 *Keb. Rep.* 285. *pl.* 8.

Or praiſed at under value.

The ſheriff perſuaded the jury to prize the goods at an under-value, and ſo ſold them. This is an oppreſſion inquirable at the aſſizes by indictment. *Cro. Jac.* 526. and *Cro. Jac.* 514, 515.

Where the old ſheriff, after a writ of diſcharge, may ſell,

If the ſheriff upon a *Fieri fac'* againſt *J. S.* ſeize certain wood whereof *J. S.* was poſſeſſed, and the ſheriff pay parcel of the money received, and does not return his writ, and after the ſheriff is removed, and another ſheriff is choſen, and after the writ of diſcharge delivered to him he ſells the wood, this is a lawful ſale, becauſe by the ſeizure, although the writ is not returned, he is chargeable to the party. *Trin.* 3 *Jac.* 73. *Ayer* and *Alderley*. And there a *Diſtringas* iſſued to the new ſheriff, to diſtrain the antient ſheriff to expoſe to ſale, which does not give to him authority to ſell, but compels him to do that which he might do by law. But if upon a *Fieri fac'*, the ſheriff returns that he had ſeized the goods, but *non invenit emptores*, and after he is removed, and a new ſheriff made, the old ſheriff may not ſell them after, though a *Diſtringas* come to him; and if he ſell them, the ſale is not good, for the new ſheriff muſt ſell them. 4 *Leon* 20. *pl.* 66. *Lat.* 117.

But not upon *non invenit emptores.*

Where no *Venditioni exponas.*

A *Venditioni exponas* may not be awarded, if it appears that the goods are out of the hands of the ſheriff. 2 *Saund.* 344.

The ſheriff (if he think fit) may ſell goods without a *Venditioni exponas*, and the ſale ſhall be good. *Cro. Jac.* 73.

Upon a *Fi. fa.* *A.* againſt *B.* goods are taken and remain unſold, yet *A.* ſues out another, and other goods are taken, and money paid to *A.*

If *A.* recovers againſt *B.* damages and coſts in *C.* or *B. R.* and ſues out a *Fieri facias* to the ſheriff, who by force thereof takes goods of *B.* to the value, and ſo returns it, and the goods remain in his hands *pro defectu emptorum*; after *A.* well knowing thereof, yet to the intent to vex and double charge *B.* ſues out another *Fi. fa.* and delivers it to the ſame ſheriff to be executed, who thereupon levies the money of other goods of *B.* and pays it over to *A.* In this caſe, for this wrong and vexation, though it

was

was in a legal way, an action upon the caſe lies. *Hob. Rep.* 257, & 350. *Cro. Eliz.* 574. *Cro. Jac.* 667.

If the ſheriff do make execution on *Fieri fac'*, though he never return the *Fieri fac'*, yet the execution is good. *Aliter in elegit. See below.* And if the ſheriff levy the money, and give it the plaintiff, though he never make any return to the court, it is good enough. 4 *Co.* 64. Where there needs no return on *Fieri fac'*.

The bailiff of the *Savoy* levied goods, and yet returns *Nulla bona* on attachment; and for cauſe ſaith, That one *V.* at the time of the execution, ſhewed a bill of ſale on good conſideration, whereby, if he executed, he was liable to an action: and therefore, without ſecurity to ſave him harmleſs, he refuſed to make any other return, which the court agreed, and ordered the money to be brought into court; and as the trial goes between the ſheriff and *V.* the return to be amended or not. *Keb. Rep.* 901. *pl.* . *Nulla bona* returned, becauſe the party refuſed to give ſecurity to the ſheriff.

Upon a *Fieri facias*, the ſheriff returneth, *Quod nihil habet*, this is not good without ſaying further, *quod habuit poſt receptionem brevis.* *Nihil habet.*

On recovery of debt on *Fieri fac'*, directed to the ſheriff of *London*, he returned, *quod clericus eſt beneficiatus in Ely.* The court conceived this return improper, in regard there ſhould have been a ſuggeſtion on the roll, after the return made by the ſheriff of *London*, that the defendant had goods in *Ely*, and that the ſheriff of that county ſhould have made this return of *clericus beneficiatus.* Now if the ſheriff of *London* return *nulla bona*, but that he is *clericus beneficiatus* in *Ely*, thereupon went a *Fieri fac'* to the biſhop of *Ely* on a *Teſtatum*, and he returned that he had *nulla bona eccleſiaſtica*; this return by ſome is not good, but he ought to return a *Sequeſtration*, having admitted him to be *clericus beneficiatus*; but he is not eſtopped to ſay, that he is not *clericus beneficiatus* by the return of the ſheriff. The court agreed the *Fieri fac'* well directed to the biſhop, and not to the ſheriff, but they conceived it a good return; and if it be falſe, the plaintiff may have his action *Ret' quod clericus eſt beneficiatus per vic' London.* *Fi. fac' epiſc' Elien'.*

on the caſe. *Keb. Rep.* 497. *pl.* 74. 2 *Keb. Rep.* 83. *pl.* 84.

Clericus *beneficiatus* to a ſtatute.

On a ſtatute, if the ſheriff return *quod eſt clericus beneficiatus nullum habens laicum feod', nec bona nec catalla*, but that he is *beneficiatus* in ſuch a dioceſe, then a writ of Sequeſtration ſhall go to the biſhop to ſequeſter the profits, and to deliver them to the conuſee until he be ſatisfied. 2 *Rol. Abr.* 474.

Action on the the caſe on a falſe return on *Fi. fa'*.

If there be falſe return on a *Fieri fac'*, the remedy is by action on the caſe. In a *Fieri fac'* to the ſheriffs of *London*, they return *nulla bona*, but that he is *clericus beneficiatus* in *Ely*; upon which a writ iſſues to the biſhop of *Ely*, and he returns *nulla bona eccleſiaſtica*. If it be ſo that he hath a ſpiritual living, the plaintiff may have action on the caſe againſt the biſhop. *Sid.* 276.

Averment of the value.

The party may aver the value of the goods greater than the return, but the ſheriff is eſtopped. 2 *Keb. Rep.* 789. *pl.* 27. 821. *pl.* 32.

Upon a *Fieri facias* directed to a ſheriff, put the caſe there are goods, in which (as it often happens) others claim a property; in this caſe, whether he returns *Fieri feci*, or *Nulla bona*, (and one he muſt) he will be liable to an action. But if it ſhall appear that he has acted fairly and indifferently, the law ſhall ſecure him whatever return he makes, and whether his return be true or falſe. 10 *Mod.* 53.

Upon ſale of a term only, reſtored to the money.

If a man recover damages, and had execution by *Fieri fac'*, and upon a *Fieri fac'* the ſheriff ſells the term for years to a ſtranger, and after the judgment is reverſed, he ſhall only be reſtored to the money for which the term was ſold, which was by default of the party, and not of the term itſelf, becauſe the ſheriff had ſold this by command of the writ of *Fieri fac'*. *Dy.* 363. 8 *Co.* 143. 5 *Co.* 90. *b.*

Upon reverſal of outlawry.

So if the goods of a man outlawed be ſold by the ſheriff upon a *Capias utlagatum*, and after the outlawry is reverſed by writ of error, he ſhall be reſtored to the goods themſelves, becauſe the ſheriff was not compellable to ſell theſe goods, but only to keep them for the uſe of the King. 5 *Co.* 90.

But upon *Fieri fac'*, he ſhall have reſtitution only to the value. Only to the value.

1. Elſe none would buy.

2. By *Fieri fac'*, the ſheriff is compellable to levy the debt upon the goods; one is *compulſio*, the other *voluntas*. 8 *Co.* 143. Muſt levy the debt.

If a man recover damages (as ſuppoſe in a writ of *Covenant*) againſt *B.* and had *Elegit* of his chattels, and of the moiety of his lands; and the ſheriff upon this writ delivers a leaſe of years of land which *B.* had, to the value of 50 *l.* part of the ſum recovered, and after *B.* reverſeth the judgment, he ſhall be reſtored to the term itſelf, and not to the value. For though the ſheriff might have ſold the term upon this writ, yet here is not any vendition to a ſtranger, but a delivery of a term to the party who recovers, by way of extent without any ſale, and therefore the owner ſhall be reſtored; for the ſheriff is not bound by this writ to ſell the term, as in a *Fieri fac'*. *Elegit* upon damages. The reaſon.

Quære, for this is a ſale, all the term being delivered to the party according to the value in groſs, and not annual. *Rol. Abr.* 778. *Quære.*

So if perſonal goods were delivered to the party *per rationabile pretium & extentum* upon reverſal of the judgment, he ſhall be reſtored to the goods themſelves for the ſame reaſon. To the goods extended.

Leſſee for 99 years, by his will deviſed his leaſe in theſe words, (viz.) *I deviſe my leaſe to my wife during her life, and after her death, I will that it go to her children unpreferred*, and made his wife executrix and died. The wife entered and married with *J. S.* and afterwards for 140 *l.* debt recovered againſt *J. S.* on a *Fieri fac'*, the term was ſold by the ſheriff, and afterwards the judgment was reverſed by writ of *Error*, and awarded, *quod omnia quæ amiſit ratione judicii reſtituantur*. The wife (the executrix) died. And, *per curiam*, theſe points were reſolved: A leaſe deviſed. The term ſold. Judgment reverſed by error.

1. The executory deviſe of the leaſe, after the death of his wife, to the daughter (unpreferred) was good. Executory deviſe.

Not deſtroyed.

2. That the ſale made by the ſheriff upon the *Scire fac'*, did not deſtroy the executory deviſe.

Reſtitution to the value only.

3. That ſale made of the term by the ſheriff ſtood good, although the judgment was reverſed; and the plaintiff (the daughter) ſhall be reſtored to the value of the term, but not to the term itſelf: and yet the vendee had an abſolute property in the term during the life of the wife. 8 *Co.* 96.

Reſtitution, and an inquiry of profits received.

A judgment in *D.* being reverſed in *B. R.* a writ of reſtitution was awarded, and to inquire what were the profits of the land recovered *a tempore judicii (viz.)* 7 *Aug.* 19 *Jac.* And the inquiſition returned, that they amounted to 10 *l.* *Per cur'*: The writ is ill, for it ought not to have been what the profits of the land amounted unto from the judgment, for the plaintiff is not to anſwer the profits longer than from the time of the execution ſued. Then there was a new writ of *Reſtitution*, which was, what profits of the land the plaintiff (who recovered) had taken *colore judicii prædicti*; which was 7 *Aug.* 19 *Jac.* and after the reverſal thereof. *Cro. Jac.* 698.

Where it ſhall be in the election of the ſheriff, upon *Fi fa'* to him directed, to ſell a term, or deliver it on extent.

For the underſtanding how the law is in this point, you muſt obſerve a diverſity between the ſale of a term on a *Fieri fac'*, and *Extent* on an *Elegit*; for the *Elegit* is, *Quia per ſacramentum* 12 *proborum, &c. per rationabile pretium & extentum*, That they appraiſe the goods and chattels of the debtor, and extend his lands; and therefore if they are not appraiſed by the jurors he cannot ſell them, (as *Dy.* 100. and ſo is 4 *Co.* 74. *a.*) Execution by *Elegit* ought to be *per inquiſitionem, per ſtat. Weſt.* 2. *c.* 18. which ſaith *(per rationabile pretium)* which exteds to chattels, and *per extentum*, which refers to lands. In *Elegit* the goods are to be delivered to the party *per rationabile pretium*; but in *Fieri fac'*, the ſheriff muſt ſell the goods. *Keb. Rep.* 566. *pl.* 72.

Difference between the extent of a term on *Elegit*, and ſale by *Fi' fa'*.

In *Elegit* the term may not be extended, without ſhewing the certainty of the commencement; for after the debt ſatisfied, the party is to have his term and remainder. But upon *Fieri fac'*, the ſheriff may ſell,

ſell, and his return is general, *quod fieri feci de bonis et catallis.* 4 *Co.* 74. *a.*

Now the ſheriff is to be careful in the ſale of a term on *Elegit*, if he make particular recital, that there be no miſtake. But a general recital is better; as, Recital of a term in the ſale of it.

In *Ejectment* it was found by ſpecial verdict, that the ſheriff upon an *Elegit* impanelled a jury, who found that the defendant was poſſeſſed of a leaſe for 100 years, which begun at *Mich.* 2 & 3 *Ph.* & *M.* *ubi revera*, as it was found, it begun *Mich.* 3 & 4 of *Ph.* & *M.* *cujus quidem H. ſtatum intereſſe & terminum in tenementis prædictis prædict' juratores appretiarunt ad* 80*l.* and the ſheriff ſold it to the leſſor of the plaintiff for 80*l.* Verdict that inqueſt on *Elegit* found one thing, and ſheriff ſold another.

Now the inqueſt found one thing, and he ſells another, (as this caſe was) and the ſale not being warranted by the inqueſt, is void. But had the inqueſt found he had been poſſeſſed of ſuch land generally for the term of divers years to come, and they had appraiſed it for ſo much, without ſhewing the certain beginning or determination, it had been well enough; for they ſhall not be compelled to find a certainty, not having means to be informed thereof: or if the ſheriff ſells all ſuch intereſt which the defendant had in the ſame term, the ſale had been good. 5 *Co.* 74. *b.* Sale void.

The inqueſt on a *Fieri fac'* found that the defendant was poſſeſſed of ſuch a term, and miſtook the date, and the ſheriff ſold it; the ſale was not good. And on the new *Fieri fac'*, the court directed that it ſhould be found, that he was poſſeſſed of a leaſe for years generally, and yet continuing, and that he ſold it. *Cro. El.* 584. 5 *Co.* 74. Sale on *Fi. fa.* and inqueſt miſtook the date. New *Fi. fa.*

W. and his wife, poſſeſſed of a term in right of the wife, as adminiſtratrix to *C.* *W.* being indebted, granted it to *B.* to the uſe of *W.* and his wife for their lives, and afterwards to the uſe of *B.* himſelf. *W.* is ſued for this debt, and recovery againſt him, and a *Fieri facias* being awarded to the ſheriff, he for this debt of *W.* ſold the term to the plaintiff. Baron and Feme.

Per cur': This grant of the term to the uſe of the grantor What term not extendible.

grantor himſelf is not void *per ſtat.* 1 *H.* 7. for this grant is not to a void creditor: for the term is in right of the wife as adminiſtratrix, and if it had ſo continued in the hands of *W.* and had never been granted, this was not extendible for the debt of *W.* and if *W.* had it as executor himſelf, it was not extendible for his proper debt, and fraud ſhall not be intended except expreſly found; therefore the ſale is good. *Cro. El.* 292. *pl.* 2.

Fraud not to be intended.

Officer firſt ſells on one judgment and delivers it up on another.

W. had execution out of the *King's Bench* by *Fieri facias*, of a term, which was ſold by the bailiff of a liberty. After, upon another judgment the bailiff delivers this term to another, pretending that the firſt judgment and execution was fraudulent. But *per Cur'*, It is not well done; for he is not a judge of fraud, and the court will not allow ſuch pretence to ſheriff and officers. *Latch* 53.

Where ſale ſhall bind the king.

If the ſheriff extend or ſell a leaſe, this ſale ſhall bind the king (as to his debt) becauſe it is but a chattel, and there was no covin. 8 *Co.* 171.

May ſell the wife's term for the debt of the *Baron.*

Upon an execution againſt the huſband for his debt, the ſheriff may ſell the wife's term during her life. *Co. Lit.* 351. *a.*

Upon ſheriff's ſale vendee muſt bring *Ejectment.*

If a ſheriff on a *Fi. fa.* do ſell a leaſe or term of an houſe, he cannot, and muſt not put the perſon out of poſſeſſion, and the vendee in, but the vendee muſt bring his *Ejectment.* 2 *Show. Rep.* 85.

Whether *Fi. fa.* may go into *Wales.*

Plaintiff recovers a debt againſt the teſtator in *B. R.* the action was laid in *London*; and after the death of the teſtator, the plaintiff after judgment in *Scire fac'* ſues a *Fieri fac'* at *London*, upon which the ſheriff returns *Nulla bona*, by which he ſues a *Teſtatum Fieri fac'* to the ſheriff of *Montgomery* in *Wales*, directed to levy the monies recovered *De bonis teſtatoris in manibus executoris.*

Sheriff not to diſpute the juriſdiction of the court.

The ſheriff by his return ought not to diſpute the juriſdiction of the court, to which he is a miniſter: but if the court erroneouſly award proceſs which was not to be awarded, the ſheriff ought to obey and execute it; but the party grieved may ſhew this matter to the court, and pray that they will

ſuperſede

ſuperſede their erroneous proceſs, and ſo have remedy. The party may ſhew it.

Elegit lies into *Wales*, and ſo doth execution on a *Statute Merchant*, and that *breve dom. regis non currit in Walliam* is intended of originals, not on judicials. 3 *Keb. Rep.* 170. *pl.* 6. *Vaugh.* 391. 2 *Mod.* 11. *Bulſtr.* 54. *Cro. Jac.* 484. *pl.* 1. *Elegit, &c.* lies into *Wales.*

A *Capias* on a *Fieri fac'* lieth into *Wales.* 3 *Keb. Rep.* 170. *pl.* 6.

It was the opinion formerly, that a *Fieri fac'* on original judgment in *B. R.* doth not lie into *Cheſter, Wales, &c.* but as *Dyer*, the court ſhall ſend the record and writ thither. And in action of debt there it may be; but it is granted every day in *Lancaſter, Wales, &c.* 2 *Keb. Rep.* 410. *pl.* 35. So does *Fi. fa'.*

A writ of execution goes into *Wales*, and 27 *H.* 8. *c.* 26. makes this plain; for by it *Wales* and *England* are annexed. *Plowd.* 200. *Wales* annexed to *England.*

So does an extent, or *Capias utlagat'*. *Godb.* 214. *pl.* 305.

So do *Certioraries* for riots, *&c. Cro. Jac.* 484. *pl.* 1. 2 *Rol. Rep.* 28. *Cro. Car.* 331. *Ventr.* 146.

So does a *Ca. ſa.* againſt the bail. 2 *Bulſt.* 55.

And a ſheriff fined for not executing it. *Ibid.* 157.

And ſee the like on a *Teſtatum Fi. fa'.* 2 *Saund.* 103. *Hetly* 18. *Cro. Car.* 34, 444. *Cro. Jac.* 484.

An *Elegit* will lie into *Wales*, or county palatine, See 3 *Nelſ. Abr.* 522. *pl.* 17.

So a *Scire fac'* againſt the heir and tertenants, 2 *Mod.* 10.

So a writ of error in real actions, *&c.* by ſtat. 28 *H.* 8. *Mo.* 248. *pl.* 391. As in a writ of right. *Cro. Car.* 226. A *Quod ie deforceat. Ib.* 128. *Sid.* 138. *Lev.* 105.

So it ſeems to lie on an *Ejectment*, or other mixt action. *Sed quære*, *Moor* 248.

In all caſes where the execution of a judgment, in which the demand is of a thing certain; if the ſheriff do this thing, he is not any diſſeiſor. But where The ſheriff to make execution of the thing at his peril.

the execution is in the generality, without mentioning of any thing in particular, the ſheriff ought to make execution of the right thing at his own peril, otherwiſe he ſhall be a diſſeiſor; for he is bound to take notice of it, and he had not any warrant from the court to make execution of any but the right thing. As if a man recover in *Aſſize* divers houſes, and after the tenant reverſeth it in a writ of error, and a writ of execution iſſues to the ſheriff, to put him in poſſeſſion of the houſes which he had loſt by the judgment, although the tertenants are ſtrangers to the recovery, and for this they ought not to be ouſted without *Scire facias* againſt them, yet if he do execution by putting them in poſſeſſion by force of this writ, he ſhall not be any diſſeiſor, for that he hath the direct authority of the court to do it. *Compl. Sher.* 262.

Diverſity.

So in judgment againſt the caſual ejector for 47 houſes, and on *Habere facias poſſeſſionem* the ſheriff turns out theſe 47 tenants, and 80 other tenants, without any proceſs or plea againſt them. *Per Cur'.* We will not grant any writ to ſuperſede the execution againſt the 80 tenants; for if it ſhould be, it ought to be *quia erronice*, and there was not any error in the proceedings againſt them, becauſe there was not any proceedings, but they did adviſe, that every one ſhould bring *treſpaſs* againſt the ſheriff. 2 *Sid.* 155.

Treſpaſs againſt the ſheriff for wrong executing poſſeſſion.

If the ſheriff do deliver poſſeſſion of more acres than are in the writ, this makes not the writ erroneous; but in ſuch caſe action on the caſe lies againſt the ſheriff for doing it; or an aſſize againſt him that hath the poſſeſſion delivered to him for the ſurpluſage of the land. But if the writ of *Hab. fac. poſſeſſ.* to deliver poſſeſſion to the plaintiff of lands recovered by him in *Ejectment*, contains more acres of land than were in the declaration, the writ is erroneous. *Compl. Sher.* 263.

Caſe againſt the ſheriff for delivering more acres than are in the writ.

Diverſity.

Treſpaſs lies againſt the ſheriff if he does not execute on the right places. *Keb. Rep.* 278. *pl.* 73. *Yelv.* 228.

Right places.

If

If a man brings *Ejectione firmæ* of 40 acres of land, and recovers 30, and not the reſidue; upon the writ of *Execution* the ſheriff may deliver to him any, *viz.* three or more in the name of all, without ſetting out the land recovered by metes and bounds, although the plaintiff had not recovered all the acres whereof he had brought this action, and whereof he had ſuppoſed the defendant tenant. But if a man be to be put in poſſeſſion of divers meſſuages upon a writ of execution, and the houſes are in poſſeſſion of ſeveral men, he ought to go to every houſe particularly, and to deliver ſeiſin of it, and the delivery of ſeiſin of one in the name of all is not ſufficient; but he ought to deliver *Plenariam ſeiſinam. Compl. Sher.* 263.

Where poſſeſſion of ſome in the name of all, good or not.

In *Formedon* on nontenure of three meſſuages the jury found he was tenant of one of the meſſuages, and not of the other; the plaintiff may have judgment, and a writ to the ſheriff to deliver ſeiſin: and the plaintiff at his peril is to ſhew to the ſheriff what meſſuage it was the jury did intend; for the jury is not tied to ſet bounds to it. *Cro. El.* 256.

Where the plaintiff is to ſhew what part the jury intended.

If a writ of *Execution* goes to the ſheriff, to put a man in poſſeſſion of 20 acres of land, the ſheriff ought to give him 20 acres in quantity, according to the uſage of the country where it lies, and not according to the ſtatute. *Dalt.* 531.

Acres to be delivered according to the uſage.

If a man recovers rent or common, upon which a writ iſſues to the ſheriff to put him in poſſeſſion, and the ſheriff comes upon the land, and delivers to him ſeiſin of the rent or common by parol, that is well made, and the recoveror is in actual poſſeſſion of this. *Dalt.* 531.

Of rent or common by parol.

If the under-ſheriff delivers poſſeſſion riotouſly on extent on a *Statute-Merchant*, and the ſheriff refuſeth to return any jury to inquire of the force, and he was an attorney of the *Common Pleas*, the court of *King's Bench*, unleſs the cauſe were depending, cannot take notice of the offence without an information. 2 *Keb. Rep.* 541. *pl.* 1. *Mo.* 462. *pl.* 649.

Riotous poſſeſſion by under-ſheriff, *&c.*

The

The recoveror is put in poſſeſſion by *Habere fac' poſſeſſionem*, and the defendant ouſts him again; what remedy?

After poſſeſſion and *ouſter* a new action.

He cannot have a new writ of execution, but is put to his new action, and the filing of the writ is not material; for it is within the election of the ſheriff, whether he will file or return it, or not. But if the execution had not been fully made, as in the execution of an houſe, ſome hid themſelves in the upper rooms, and when the ſheriff was gone, they came down and ouſted thoſe that the ſheriff had put in poſſeſſion before; in ſuch caſe a new writ of *Execution* was awarded. By the *Chief Juſtice*; In the caſe of re-entry, the court may award an attachment againſt him for contempt againſt the court. 2 *Brownl.* 216.

A new writ of execution.

If the writ be not returned.

But in *Peviſon* and *Travener*'s caſe, the recoveror is put in poſſeſſion by *Hab' fac' poſſeſſionem*, and the defendant ouſts him again; if the writ be not returned, the plaintiff ſhall have a new *Hab' fac' poſſeſſionem*. *Rol. Rep.* 353. *pl.* 2.

Good without return.

And if *Hab' fac' ſeiſinam* be executed, it is good without return; yet the court may command the ſheriff to return it. *Rol. Rep.* 77.

May not return another is tenant.

On *Habere fac'* (*ſeiſinam*) the ſheriff cannot return, that another is tenant of the land by right, for that cannot come in iſſue between the demandant and him, and therefore he ought to execute the writ. 6 *Rep.* 52. *Boſwell*'s caſe.

Return that ſome were concealed in the houſe, and expelled the plaintiff, &c.

Upon *Habere fac' poſſeſſionem* the ſheriff returned, that in the execution of the ſaid writ he came to the houſe recovered, and removed out all the perſons he could find, and delivered to the plaintiff poſſeſſion, and departed; and ſoon after three perſons, ſecretly lodged in the houſe, expelled the plaintiff. On notice whereof he returned again to the houſe to put the plaintiff in full poſſeſſion; but the others reſiſted him, ſo that without peril of his life he could not do it. *Leon.* 145. *pl.* 202.

New *Hab. fac' poſſ'*.

On this return the court awarded a new execution. A writ of *Habere fac' poſſeſſionem* was directed to the ſheriff; a writ of error was brought, and a

Superſedeas

perſedeas granted, directed to the ſheriff to ſtay ecution: and the *Superſedeas* was ſhewed to the eriff as he was going to do execution; yet he re- ſed to obey it, and did execution notwithſtanding, his is a great contempt in the ſheriff, and the court dered a writ of reſtitution to be granted. 2 *Bulſtr.* 4.

Execution by the ſheriff after a *Superſedeas.*

The ſheriff, in caſes where land is recovered, is to t the party in poſſeſſion and ſeiſin by a twig, clod, . of an houſe by the key, *&c.* of rent by corn graſs growing on the land, out of which the rent ues. 6 *Co.* 52.

It is no good return, that another is tenant of the d by right, or that he has nothing in the land, at returns he may make, or not. *New Ret. Brev.* o, *&c.*

Seiſin of the land in one vill, in the name of all lands in three vills, is good.

Upon an *Habere facias ſeiſinam* in dower, the ſhe- returns that he offered her ſeiſin of a third part, d ſhews it to the court) and that ſhe refuſed to cept it of him; adjudged a good return, and no *bere facias ſeiſinam de novo.* *Dy.* 278.

He offered her ſeiſin, and ſhe refuſed.

Where upon an *Habere facias ſeiſinam*, the ſheriff urned, that the party who ought to take the *Seiſin eſt proſecutus breve*, and ſeemed to be good. *Rol.* r. 460.

That the party *non eſt proſ. breve.*

Upon an *Habere facias poſſeſſionem*, the ſheriff re- ns that he was always ready to deliver poſſeſſion, d that the plaintiff never came to receive it.

Always ready, and none to receive poſſeſſion.

If the roll be marked for a writ of error before ecution done, the ſheriff ſhall be excuſed for doing before a *Superſedeas* delivered, but this is ſufficient ſuperſede the execution. *Keb.* 12. If a writ of or be brought, and ſhewed to the attorney, if ecution proceed, a *Superſedeas quia erronice* may But in *Noel's* caſe, 2 *Keb.* 33. error brought d ſhewed to the attorney, is no good *Superſedeas*, it be ſhewed to the clerk of the *errors.*

What amounts to a *Superſedeas.*

Where writ of error is a *Superſedeas.*

Till the roll marked, or the writ delivered unto officer in court, writ of error is no *Superſedeas*, eſpecially

Not till roll marked, *&c.*

especially after the return of it. 3 *Keb. Rep.* 191. *pl.* 39.

Recipitur.

The party ought to take notice of a *Recipitur* upon the record, if it be entered, and if the party takes out execution after the writ of error allowed, it is a contempt, else not; and the attorney is not bound to view the record, if a writ of error be brought, but may take out execution if there be no a *Superſedeas*, or notice given to the party. *Sty.* 195. It is the duty of the clerk of the errors to mark the roll, and not the attorney. *Style's Rep.* 159. *Mayor* and *Rule*. A writ of error is duly purſued, though the roll be not marked; and if neither the roll be marked, nor notice given to the attorney of the other ſide of the bringing the writ of error, if the party proceed to take out execution, it is no contempt to the court.

Contempt.

Superſedeas, or notice.

No contempt.

Where and when a writ of error is ſuperſeded, or not.

Marking the roll, paying fees for, or allowance by the Chief Juſtice of a writ of error, is no *Superſedeas*, unleſs actually taken out before execution. *Per Twiſden*, Error brought and ſhewed to the attorney, is no *Superſedeas* until it be ſhewed to the clerk of the *Errors*, which is an allowance in court and therefore if execution be done before it be allowed by the judge, or ſhewed to the clerk of the *Errors*, it is well done, becauſe the attorney otherwiſe would never have it allowed, but only ſhewed to the attorney of the other ſide; but if he ſhew it and declare his intention to have it ſpeedily allowed, there execution is ſuperſeded in the mean time; but yet if bail is not given according to the *ſtatute*, the execution may be well done; which the court agreed. *Keb. Rep.* 33. *pl.* 89.

Bail given in.

How formerly, *quære*.

Formerly (*per Hale*), if execution was gone out before a writ of error delivered, or ſhewed to the party, it was not to be a *Superſedeas*, and by him it ſhall not be a *Superſedeas*, unleſs ſhewed to the party, and muſt not foreclose his fine in having it allowed; for if it be not allowed by the court within four days, it is no *Superſedeas*; and a writ of error taken out, if it be not ſhewed to the clerk of the other

er ſide, and allowed to the court, it is no *Super-*
eas to the execution. *Mod. Rep.* 112.

The ſheriff makes his warrant to a bailiff to take body of, *&c.* upon a *Ca. ſa.* and before the war- t executed, the ſheriff receives a *Superſedeas*, and bailiff having no notice proceeds; yet the arreſt not lawful, but the bailiff is excuſable in treſpaſs. 677. *pl.* Time of the delivery of the *Superſed.* before an arreſt.

One purchaſeth a *Superſedeas*, and doth not de- r it to the ſheriff till after the fourth county day, then he is outlawed, yet the outlawry is void. *or n.* 73. *Ca. ſa.* was delivered to the ſheriff of E. at 11 a clock, and a warrant thereupon made the bailiff, 4 hours after a *Superſedeas* comes to ſheriff, and a warrant upon this *Superſedeas* deli- ed to the gaoler, to ſet the parties at liberty if they re priſoners, who upon it were diſcharged. *Per* ; The ſheriff hath done well, being the ſame *Lit. Rep.* 296. Outlawry after a *Superſedeas*, but before delivery.

Fi. fac' to the ſheriff to levy the debt, and the endant brought error, and had a *Superſedeas*; ſo ch money as the ſheriff had received before, ſhall to ſatisfaction, and a *Venditioni exponas* ſhall iſſue on it. *Yelv.* 6. Upon a *Fi. fa.* and part levied.

Superſedeas as to goods ſeized, is a *Superſedeas* as ſale; but if the ſheriff hath received the money, muſt return it into court. 3 *Keb. Rep.* 174. 9. and it is not diſcharged by the *Superſedeas.* d the caſe was, a *Superſedeas* came before execu- , but in truth after goods ſeized and before goods , but after the ſheriff had taken ſecurity for the ney, and diſcharged the execution; ſheriff re- ns that he had received a *Superſedeas* out of *Chan-* in the nature of an *Aud. querela*, it is not good, auſe the record was not there. *Rol. Abr.* 383. Where a *Superſed.* ſhall ſtay the ſale of goods or not.

That a priſoner in execution may be diſcharged parol of the plaintiff, and if the ſheriff detain after, falſe impriſonment lies. Diſcharge of priſoner by parol.

A *Certiorari* delivered to the juſtices of the peace r reſtitution awarded, and before it be executed the ſheriff, is not a *Superſedeas* to the ſheriff, un- the juſtices make a *Superſedeas* upon it, which Upon a *Certiorari.*

if

if they do not, they are finable for the contempt. *Mo.* 673.

Taken away after verdict.

By the ſtat. 16 & 17 *Car.* 2. *c.* 8. perpetuated by 1 *Jac.* 2. *c.* 17. *ſ.* 5. *all ſtays of execution by* Superſedeas *on writs of error after verdict, are taken away*; but the other remains as it did.

Audita querela is an equitable writ.

Audita querela is an equitable writ, and not to be allowed without equity.

Upon an eſcape by conſent.

If one in execution eſcape of his own wrong, he ſhall never have *Audita querela* to diſcharge himſelf, and the gaoler may retake him; but if he eſcape with the conſent of the gaoler, the gaoler cannot take him again; and if he do, the party ſhall have an *Audita querela*. *Cro. Car.* 240. *Rol. Abr.* 307.

Upon an arreſt in execution.

So if the ſheriff arreſts one in execution, and doth not return the writ, but ſuffers him to eſcape, and upon the *Alias capias* he arreſts him again, *Audita querela* lies. *Mo.* 57. *pl.* 163.

Where two are bound, &c.

But where two were bound jointly and ſeverally, one was condemned and taken in execution, after the other was ſued, condemned and taken; the firſt eſcapes, the other ſhall not have *Audita querela*, for there muſt be ſatisfaction in part. 5 *Co.* 67.

Where ſurpluſage ſhall not hurt this writ.

A word that is ſurpluſage, ſhall not avoid this writ; the *Audita querela* comprehended, that *M.* had recovered againſt the plaintiff in debt, and that he was taken by *Cap. ad ſatisfaciend'* at the ſuit of *M.* by the ſheriff of *G.* who let him go at large, and on iſſue upon the voluntary eſcape it was found for the plaintiff. And it was moved, that the writ of *Audita querela* was not good, for the words are, that the plaintiff *capt. fuit. virtute brevis noſtri judicialis*, and this word *judicialis* is not in the Regiſter, but only *brevis noſtri de capiendo*; yet adjudged good. *Leon.* 73.

On eſcape of teſtator's creditor, &c.

Audita querela on eſcape of the teſtator's creditor, and a recovery againſt the marſhal. Defendant *pro teſtando*, that the plaintiff eſcaped after the defendant recovered againſt the marſhal, and the plaintiff did not pay the marſhal, *abſque hoc* that the marſhal ſatisfied and paid the teſtator. This caſe differs from all

all others of escape by consent of the gaoler, this being not purely debt which goes over to executors, but is grounded on a tort general by the death of the gaoler; the court concluded, that recovery against non-payment to the marshal, was no discharge of the plaintiff in this *Audita querela*. But *adjornatur*, to take issue on payment by the marshal to the creditor, *viz.* the defendant's testator. 3 *Keb. Rep.* 763. *pl.* 54.

Outlawry pleaded to *Audita querela*, where it is good or not.

One was outlawed in debt, and taken upon the *Capias* and committed to the *Fleet*, and the warden suffered him to go at large voluntarily; and after, the executor of the plaintiff in debt takes him in execution gained upon a new writ, and upon this he brought *Audita querela*, and shews this matter, and outlawry in the plaintiff in the *Audita querela* was pleaded. *Per Cur'*; It is a good plea, because this writ is not directly to reverse the outlawry (as error is) but is founded upon a tort, (*scil.*) upon the escape, and not upon the record only; *aliter* in error or attainder. Outlawry is no plea; nor is there any difference as to this case, where the outlawry is at the suit of the defendant, or of a stranger. See other good reasons, *Sid.* 43.

Where it is a good plea.

Where upon an *Elegit* more than a moiety is delivered.

If upon *Elegit*, the sheriff takes an inquisition, and there are found several lands subject to the *Extent*, and found of the several values; and the sheriff returns he had delivered some of the said lands in particular for the moieties, where it appears, that according to the values found an equal moiety is not delivered to the party who recovers, but more than a moiety; this is not void, neither is it a *Disseisin* by the entry, but only voidable by an *Audita querela*.

Ancient demesne lands extended.

If *A.* recover against *B.* debt or damages, and *Elegit* is granted to the sheriff to extend the moiety of his land, which is *Ancient demesne*, although it be admitted that this is not extendible, yet *B.* may not avoid this by entry, without *Audita querela*, because the sheriff had a warrant to deliver the moiety of half his land, and this was his land, *Ergo* not void. *Hob.* 47. *Danv. Abr.* 629. *pl.* 5, 660. *pl.* 21.

Audita querela.

21. 3 *Danv. Abr.* 306. *pl.* 4. *Brownl.* 234. *Mo.* 211. *pl.*

The nature of an *Elegit*, as to lands or goods.

Elegit is a judicial writ given by the *ſtatute W.* 2. *c.* 18. either upon a recovery for debt or damage, or upon a recognizance in any court. By this writ the ſheriff ſhall deliver to the plaintiff, *omnia catalla debitoris (exceptis bobus & aſris carrucæ) & medietatem terrarum*, and this muſt be done by inqueſt taken by the ſheriff, for the valution of the goods and lands ought to be firſt found by the inquiſition of a jury. *W.* 2. *c.* 18. gives the *Elegit*, ſo that in *Elegit* the ſheriff may take in execution the moiety of the land of the coniſor, *&c.* and all his goods and chattels (except as aforeſaid), and was to deliver them to the coniſee, or he who recovers, upon a reaſonable extent or price, until the debt be ſatisfied, and the ſheriff ſhall deliver him the ſeiſin of the land, and he is called tenant by *Elegit*, and ſhall do no waſte. 3 *Co.* 12. 4 *Co.* 47.

As to goods.

The *Elegit* as to goods, is in effect but a *Fieri fac'*; and therefore if there be no lands, and execution be upon goods, and they are not ſufficient, he may have a *Capias*; *aliter* if lands be extended.

Upon *Nihil* the party may have a *Capias*.

One prayed to have an *Elegit*, and the ſheriff returned he had no lands, and he prayed a *Capias*, but the court granted not; the cauſe is the entry in the roll is, that he hath choſen the execution of the moiety of the lands which he muſt ſtand to, 13 *Ed.* 3. But the law now is not ſo, for if the ſheriff return *nihil*, the party may have a *Capias*. *Hob.* 57.

Leaſes for years.

All the goods and chattels, in which are included leaſes for years, ſhall be extended, (except oxen and beaſts of the plow) the moiety of the lands.

A *Rent-ſeck*.

A *Rent-ſeck*, where there is not any reverſion, cannot be delivered *ut liberum tenementum*. *Cro. Eliz.* 656. *pl.* 20.

Fee-farm rents.

Fee-farm rents are extendible upon an *Elegit*, and yet the words of the ſtatute, which give the ſheriff authority, are only land, *medietatem terræ*. *Arg.* 10. *Mod.* 526.

Since the ſtatute of *Quia emptores terrarum*, if a man gives land in fee, reſerving a rent, it is a rent-

ſeck

eck in a ſubject, becauſe a tenure cannot be created t this day, and every fee-farm rent, when granted y the King, becomes rent-ſeck, and therefore not o be extended. *Arg.* 9 *Mod.* 72.

Annuity. Annuity certain is extendible by *Elegit*. *Cro. Jac.* 8. *pl.* 10.

Ancient demeſne. Lands in *Ancient demeſne* may be delivered in exe- ution by the ſheriff by force of an *Elegit* out of the King's court, for the land itſelf was never put in lea directly in the King's court. 5 *Co.* 105. *Hob.* 7. *pl.* 53. *Brownl.* 235. *Mo.* 211. *pl.* 351.

Infant. If the lands deſcend to an infant, the ſheriff ſhall ceaſe to extend.

Intailed lands. Neither are intailed lands in the hands of an heir xtendible upon an *Elegit* or ſtatute. *Cro. Jac.* 85.

Inquiſition void in any part, void in the whole. If the inquiſition in *Elegit* be void in any part, it void in the whole, and the whole muſt be quaſhed; nd not *quoad* that only; ſo if more than a moiety e delivered on the *Elegit*, it is void for the whole. *Keb. Rep.* 582. *pl.* 119. *Sid.* 91.

Quaſhing *Elegit*. It was moved in the ſaid caſe of *Harris*, to quaſh n inquiſition of *Elegit* upon judgment in *B. R.* be- auſe it appears not in what county the lands ex- ended were; but *Monmouth* being in the margent, nd directed to the ſheriff there, and the return ade by him, it ſhall be intended in *Monmouth*. 2 *Keb. Rep.* 582. *pl.* 119.

The jury cannot alter a verdict in ſubſtance. Upon a writ of *Extendi facias* upon a ſtatute, if he ſheriff impanel a jury, and they deliver the ver- ict to the ſheriff in writing, they may after make more formal, but cannot alter it in ſubſtance; for is a compleat verdict by delivery of it to the ſhe- iff. 2 *Rol. Abr.* 712.

Elegit vitious upon omiſſion. *Elegit* recites the judgment, *quod elegit executionem* f the goods, and of a moiety of the lands; and the rit was, *Ideo tibi præcipimus quod bona & catalla* of he defendant's, *quæ habuit die judicii prædicti redditi eliberari fac'*, omitting theſe words, *& medietatem errarum & tenementorum prædict'*, *tenend.* the ſaid oods and moiety of the lands, *quouſque debitum le- etur*, by virtue whereof the ſheriff delivered the moiety in execution. *Per Cur':* This ſhall not be

Amendment. New *Elegit*.

amended, and he ought to have a new *Elegit*; because the inquiſition was taken without warrant, the ſheriff having no warrant to extend thoſe lands. *Cro. Car.* 162.

Two inquiſitions on one ſtat. merchant.

Two inquiſitions, taken at ſeveral days by ſeveral juries upon one *Statute Merchant*, were adjudged naught; one was taken of the land, and the other for the lands and goods. *Brownl.* 38.

The ſheriff not to deliver the leaſe at another value than the jury find it.

Leſſee had a leaſe of the value of 100 *l.* and after the *Teſte* of the *Elegit*, and before the ſheriff had executed the *Elegit*, aſſigns his term to one, who aſſigns it over to the plaintiff in the *Scire fac'*; and afterwards the ſheriff executes the *Elegit*, and delivers the leaſe to the plaintiff, *tenend'*, &c. for the ſatisfaction of the debt, which came but to 43*l.* 6*s.* 8*d.* *Per Cur'*; The ſheriff could not deliver the leaſe at another value than what the jury had found it at.

Sale by the ſheriff, as ſtrong as in open market.

And the ſale made by the ſheriff is as ſtrong as if it had been made in open market, and all the goods and chattels are bound after the *Teſte* of the *Elegit*, and cannot be ſold by the owner after. *Brownl.* 38.

Upon *Elegit* there needs no *Liberate*; *aliter* upon a ſtatute. *Mar.* 117.

The ſheriff to ſet the moieties diſtinctly.

In every *Elegit* the ſheriff muſt return and ſet out the moiety diſtinctly, unleſs they be tenants in common, and in that caſe he muſt return the ſpecial matter. *Brownl.* 38. See *Comb.* 217.

Sale or *Extent* of a leaſe, and the diverſity.

On inquiſition of a leaſe which is but a chattel, the ſheriff may ſell it as goods; but if he extends it, there ſhall be no other benefit than as of a common *Extent*. *Id. ib.*

On the ſecond *Elegit*, the ſheriff can only deliver a moiety of the moiety left.

Two perſons recovered ſeverally againſt one in debt: he who had the firſt judgment ſued firſt an *Elegit*, and the ſheriff prayed the advice of the court. *Per Cur'*: He ſhall deliver but the moiety of that moiety which he had at the time of the writ awarded. *Cro. Eliz.* 482.

Two *Elegits*, and the whole lands extended by them.

S. H. acknowledged two judgments in debt to *A.* upon bond, and was bound to *F.* in a bond, bearing date before the judgments. *F.* aſſigns his debt to the King. *A.* takes out execution upon his judgment,

dgment, *viz.* two *Elegits*; by one he has one oiety of *H.*'s lands, by the other the other moiety: hen proceſs iſſued out of the *Exchequer* for the debt ſigned to the King. *Per Cur'* it was reſolved,

1. This ſubject's title is *prior* to the King's, and e King is bound by the ſtat. of 33 *H.* 8.

2. The two *Extents* are well executed; becauſe th judgments are in one and the ſame term, and priority between them. *Hardr.* 23.

Actual poſſeſſion ought not to be delivered on *legit*, the ſheriff ought only to deliver ſeizure to able the plaintiff to maintain an *Ejectment*, and e tenant may plead on the *Ejectment*, elſe the te- nt would be turned out unheard, and be remedi- s; yet if actual poſſeſſion be delivered, it is reme- eſs. 3 *Keb. Rep.* 243. *pl.* 61.

Actual poſſeſſion not to be delivered on *Elegit*, only to enable an *Ejectment*.

In *Elegit* the ſheriff ought to deliver the moiety metes and bounds. *Hut.* 19.

The moiety to be delivered by metes and bounds.

If the land be firſt executed upon a *ſtatute*, and erwards an *Elegit* upon a judgment obtained be- e the acknowledging of the ſtatute come alſo to ſheriff, the moiety of the land extended ſhall be livered to the plaintiff upon the judgment. *owml.* 30.

Note the practice of attornies in not awarding *gits* on the roll. *Comb.* 232.

If a man ſue an *Elegit* upon a recovery, and the riff return, that he made partition of the lands the defendant by twelve jurors; but he could deliver the moiety to the parties according to writ, becauſe all the land was extended to an- er upon a ſtatute: He may after have a *Ca' ſa'*, this return is all one with a *Nihil* returned. . *Eliz.* 160. *pl.* 50. *Hob.* 57. *Leon.* 176. *pl.* 7.

Ca. ſa. after an *Elegit*.

If one pray an *Elegit*, and this entered on record *Banco*, and takes out the writ; and before the rn of it the record is removed into the *King's* ch where the judgment is affirmed within the ; and after it is affirmed to the court, that the iff had returned his writ *in Banco*; yet the plain- may have a *Capias*, for that this allegation doth

Record removed before the return.

not appear to the court; and now it is impoſſible it can be returned here, and ſo it is ſtronger than if a *Nihil* had been returned. See 2 *R. Raym.* 1451.

What return, where there needs no return.

'Twas queried, if upon *Elegit* the ſheriff ought to return the extent; and alſo that he hath delivered the lands. And, *per cur'*, *Elegit* needs not be returned. Therefore if the ſheriff by force of an *Elegit* delivers to the party the moiety of the lands of the defendant, and does not return the writ; if now the plaintiff will bring action of debt *de novo*, the defendant may plead in bar the execution aforeſaid, though the writ of execution was not returned. *Leon.* 280. *pl.* .

On an *Elegit*, if the ſheriff deliver more than a moiety, the execution is void. 2 *Salk.* 563. *pl.* 2. *R. Raym.* 718. See *id.* 346.

Extent by bailiff of a liberty.

The ſheriff returns upon *Elegit*, that the party had not any lands, but only within the liberty of St. *Edmundſbury*, and that *J. S.* bailiff there, hath the execution and return of all writs, who inquired and returned an *Extent* by inquiſition, and that the bailiff delivered the moiety to the party, and the plaintiff by virtue of that *Extent* entered.

Per cur': 1. The bailiff may make ſuch inquiſition by warrant from the ſheriff.

2. When a jury by the inquiſition find the ſeiſin and value of the lands, the jury ſhall extend all the land; and the bailiff in a franchiſe, and the ſheriff where there is none, ſhall deliver the moieties, and not the jury. *Cro. Car.* 319. *pl.* 13.

The ſheriff to deliver the moieties, and not the jury.

On an *Elegit*, averring no goods were ſeized, it hath been held no *Scire facias* lieth; but upon a *Fieri fac'* bare ſeizure is an execution. 2 *Keb. Rep.* 780. *pl.* 27. 821. *pl.* 32.

Return, where there other lands, not to be in ſeveralty.

It was found by inquiſition on *Elegit*, that the defendant was ſeized of the moiety of a meſſuage and lands for life, and other lands in the right of his wife; the ſheriff returns, *Quod virtute brevis, &c. deliberari feci medietatem omnium præmiſſorum, videlicet, medietatem medietatis unius meſſuagii necnon pomar' necnon unum clauſum.* The *Elegit* was filed the return is not good; the ſheriff ought to have delivered

delivered to him the moiety of the lands jointly, so that the tenant by *Elegit* may be tenant in common of a fourth part with the jointenants. But by this delivery in severalty, he had in effect but the eighth part; for the other jointenant may occupy the land delivered with him in common: if it had been *duorum pomariorum*, it had been good. And he cannot have a new *Elegit* properly, but the plaintiff shall make a surmise that the sheriff *male suggessit* in the execution of the *Elegit*, and then he shall have a new one at his peril. *Latch* 77.

New *Elegit*.

An *Extent* upon a statute-merchant. The plaintiff put the conisee in possession of parcel of an house and lands, and suffered the conisor to continue in the rest of the house, by reason whereof the conisor kept the possession of the whole, and held the conisee out. The conisee, to the intent he might have a full and perfect possession of the whole, caused the sheriff that he did not return the writ of *Extent*, on which it is entred on the roll, *Quod vicecomes nihil inde fecit nec misit breve*; an *Alias breve extendi facias* may well be awarded. And the sheriff cannot return, that the land was formerly extended by the old sheriff, because by the entry upon the roll it appears that no execution was done; but if the entry be not, the same is an execution for the party, though it be not returned. 2 *Leon.* 12. *pl.* 20.

Conisor keeps the possession of the house.

An *Alias extendi fac'*.

Where it may be, or not entry of the return and the roll.

After one *Elegit* returned, they cannot have another *Elegit* without continuances. But *per cur'*: The course is not to make continuances in the roll, but awards severally. And *per cur'*: If *nihil* be returned, he may have a new *Elegit*; but if an acre be returned, he can have no other. *Keb. Rep.* 91. *pl.* 74.

New *Elegit* without continuances.

Sheriff takes inquisition upon *Elegit*, the plaintiff may enter immediately before the return of it. *Rol. Abr.* 738.

Entry before return.

The sheriff returns *Nihil* as to goods and chattels on the first *Elegit*, yet on the second *Elegit* a lease for years was taken in execution, though the suggestion for the second writ was of lands, and nothing of chattels. *Mo.* 341. *pl.*

Upon a *Nihil*.

Return must be on an inquiſition.

Upon *Elegit* the ſheriff returned, that he had delivered to the plaintiff goods and chattels of the defendant's *ad valentiam* 20*l. per rationabile pretium*, and ſhewed what the goods were in certain; and alſo that he had delivered 20 acres of land of the defendant's, *quæ eſt medietas omnium terrarum per rationabile extentum*, but returned no inquiſition, *ſcil. per ſacramentum* 12, *&c. Per cur':* There ought to be inquiſition, and the ſheriff himſelf cannot extend it. *Dy.* 100.

In conſideration he would proſecute a new *Elegit*, a promiſe to procure the goods to be found, is not good.

Plaintiff declares where the defendant had ſeized goods of *J. S.* by virtue of an *Elegit*, ſued by the plaintiff, and delivered to the defendant, being deputy ſheriff, he in conſideration that the plaintiff, at the requeſt of the defendant, would proſecute another *Elegit*, and deliver to the defendant, and authorize ſome perſon to receive the goods to be found by the inquiſition, and to deliver the goods to the perſon authorized. *Per cur':* The promiſe is not lawful; the ſeizing of the goods by the firſt *Elegit* was not good, for want of an inquiſition, and it differs from a *Fieri fac':* ſo that the defendant is a treſpaſſer *ab initio*, and this promiſe is to make good his tort, and the ſheriff muſt return a jury differently, and this promiſe engageth him to the contrary; and one part of the promiſe being unlawful, makes all vicious. 2 *Jo.* 24. *Cart.* 223.

Where ſhall be a new *Elegit*.

A new *Elegit* iſſued upon ſuggeſtion, that the party had other lands in the ſame county; for if it appeared that one takes part of the land upon delivery of the ſheriff, and accepts it, he cannot after take a new extent; and if he does, it is wholly void, for then the record is ended, and the attornies of both parties are out of court: but if it is found that he came into court, and ſurmiſed that the party had other lands in the ſame county, and prayed a new *Elegit*, he ſhall have it; for this is intended the firſt day of the *Extent* returned, and then it is reaſonable he may have it, and pray a new *Extent*, for he never accepted of the firſt. *Mo.* 341. *Cro. Eliz.* 310.

Where no re-extent for new *Extent*.

After a full and perfect execution had by *Extent*, and returned of record, there ſhall never be any re-

extent

xtent upon any eviction; but if the *Extent* be in-fficient in law, there may go out a new *Extent*; *Elegit* iſſued out againſt *G.* eſq; who at the time ſuing the writ was baronet, it was inſufficient nce the ſtat. 23 *H.* 8. *cap.* 5. *Co. Lit.* 290, *&c.*

If more than a moiety be delivered upon the *Elegit*, is void for the whole. *Sid.* 91. *pl.* 12. See 10 *in. Abr.* 594. *pl.* 21. More than a moiety.

The ſheriff may extend or ſell a leaſe, and this ſale hall bind the King, becauſe but a chattel, and no ovin in the caſe. Judgment in debt againſt jointe-ant for life, who releaſeth to the other and dies. he plaintiff ſues *Elegit*. *Per cur':* The releaſe, eing his own act, ſhall not diſcharge his moiety of he execution, for by the acceptance of the releaſe e has deprived himſelf of the *jus accreſcendi*. 7 *Co.* 8. How delivered.

A rent-ſeck (where there is not any *rediſſeiſin*) annot be delivered *ut liberum tenementum*. *Cro. liz.* 656. Annuity certain is extendible by *Elegit*. *ro. Jac.* 78. What ſhall be delivered.

Where the ſheriff extends a manor by the name f acres, land, meadow, wood, no advowſon paſſeth. *w.* 4. Manor.

Upon recovery in *C. B.* againſt *G.* the plaintiff rays *Elegit* to the ſheriff of *London*, where the action as brought, and to the ſheriff of *Lancaſter* (as the ourſe is) by *Sci' fac'* directed to the chancellor of he *county palatine*; and this *Elegit* appears to be rounded upon a *Teſtatum*, firſt made by the ſheriff f *London*, that *G.* had nothing in *London*, *ubi revera* hey never made ſuch return; and upon this the heriff returned that he took a leaſe of tithes, which he ſheriff delivered to the plaintiff, as the goods and hattels of *G.* for the debt, and that *G.* had not *plura ona*, *&c.* *Per cur':* No return being made by the heriff of *London*, and it appearing that no *Teſtatum* as ever awarded, it is error; for the plaintiff in *B. C.* might have taken his *Elegit* immediately into *London* and into *Lancaſter*, yet he hath waived this enefit, and grounds his execution upon a *Teſtatum* which is falſe: and now *G.* ſhall be reſtored to his Grounded upon a *Teſtatum*.

Elegit into *London* and *Lancaſter*, or any other counties.

On sale of a term, where the term shall be restored or not.

term again; for the sale and delivery of the lease to the party himself on an *Elegit*, is no sale by force of the writ, and it is in law but a bare delivery in *specie*, and upon reversal shall be restored in *specie*, and doth not alter the property absolutely, but attends the goodness or illness of the execution. But if the sale had been to a stranger for 100*l.* though the value had been 1000*l.* yet upon reversal he shall not have the term, but the money, for it is the folly of the party that he did not pay the judgment. So on sale by *Fi' fac'*, the term shall never be restored. *Cro. Jac.* 246. *Yelv.* 179. *Yelv.* 180.

Sci' fac' post annum & diem.

If no return be upon *Elegit*, the party after the year and day shall have a *Sci' fa'*, and after this a new *Elegit*. *Mo.* 24. *pl.* 83.

If goods be sufficient, the lands are exempted.

If the goods and chattels of the King's debtor be sufficient, and so can be made appear to the sheriff, whereupon he may levy the King's debt, then ought not the sheriff to extend the lands of the debtor or his heir, or of any purchaser, or tertenant.

The King to be preferred.

If one extends a *Statute staple* at the suit of *A.* the sheriff extends the lands, and takes the goods, and seizeth them into the hands of the King, but does not make livery, and after a writ of *Prerogative* of the King issues out of the *Exchequer*, and commands the sheriff to levy the King's debt of *B.* (*viz.*) 100*l.* of the goods of the debtor, and if he had not sufficient, then to extend his lands; and this is delivered to the sheriff after the first *Extent*, but that was not returned. The sheriff in this case ought to execute the *Extent* for the King's debt, because the property of the goods and lands were not in *A.* before they were delivered to him by a writ of *Liberate*, and the goods being seized into the hands of the King for the use of the party, were privileged from all other executions, but that of the King only. 2 *Rol. Abr.* 158. *Dy.* 67. *Hob.* 339.

Property of the goods not in the plaintiff before *Liberate*.

Where officer converting goods levied, is felony.

Where the officer without any warrant or authority shall levy any duty for the King, and shall after account for the same in the *Exchequer*, or otherwise pay the same to the King's use, there the officer seemeth chargeable but as a trespasser; but if he shall

ſhall convert the ſame to his own proper uſe, it is felony.

If a man be bound in a ſtatute merchant, (and does not pay the debt at the day) execution thereof ſhall be done in this manner: The coniſee muſt come to the mayor, or other officer, before whom the ſtatute was acknowledged, and pray him to certify the ſame into the *Chancery*, under his ſeal, *&c.* and if he will not certify it, then a writ of *Certiorari* muſt be ſued forth of *Chancery*, directed to the ſaid officer, to certify the acknowledgment of the ſaid ſtatute into the *petty-bag* office in *Chancery*, and upon the certificate a writ of execution; *ſcilicet*, firſt, a *Capias* ſhall go out to the ſheriff againſt the body of the coniſor *(ſi laicus ſit)*; but the debtor, after he is taken, hath liberty given him (within a quarter of a year) to ſell his lands and goods to diſcharge his debts; and if he do not agree for his ſaid debts within the next quarter, or if he cannot be found, then all his lands and goods upon *Extendi facias* ſhall be appraiſed by a jury, and ſhall be delivered to his creditors by a reaſonable time, to hold till the debt be fully paid: and yet the body of the debtor, if he be taken, ſhall remain in priſon until the debt and damages be paid. And this writ may be returnable into the *C. B.* or *B. R.* Execution *Statute merchant.*

Though it be within a franchiſe, the ſheriff is to execute it himſelf. Franchiſe.

If the ſheriff return, that the debtor is a clerk, then an *Extent* ſhall go out againſt his lands and goods only. *Clericus.*

If the debtor find ſureties, they ſhall be ordered in all things as the principal; *ſcilicet*, as to the arreſt of their bodies, and delivery of their land and goods. Sureties.

The ſtatute ought to be ſhewed to the court where the *Certiorari* is returned. Statute ſhewed.

The creditor, out of the profits of the land, is to find the debtor bread and water in priſon.

A *Statute ſtaple* is of two ſorts. Staple of two ſorts.

1. *Per* ſtat. 26 *Ed.* 3. *c.* 9. *& ſic propriis dicitur*, and is acknowledged before the mayor of the ſtaple.

2. *Per*

2. *Per* ſtat. 23 *H.* 8. *c.* 6. before one of the chief juſtices, or before the mayor and recorder of *London*.

A *Statute ſtaple* muſt be certified in *Chancery* as a *Statute merchant*, and on that certificate execution ſhall go preſently forth againſt the body (*ſi laicus ſit*) and lands and goods of the coniſor returnable into *Chancery*, in the *petty-bag* office there, and not into *B. C.* or *B. R.* as a *Statute merchant*.

The ſheriff on this ſhall take the body of the coniſor, and *per ſacramentum proborum*, &c. preſently extend, and prize and ſeize into the King's hands his lands, goods, and chattels, and ſhall certify the appraiſement into *Chancery*.

Upon which the coniſee ſhall have a *Liberate* to the ſheriff, to deliver theſe lands and goods to the value of his debt, and ſhall not be delivered to him by the ſheriff before the *Liberate*.

Effect of theſe writs.

By force of the writ on the *Statute merchant*, the ſheriff may deliver the lands and goods preſently upon the extent to the party. But by the writ on *Statute ſtaple*, or recognizance, in the nature of it, he is to extend the lands and goods, and to ſeize them into the hands of the King; but not to deliver them to the party without a *Liberate*.

Difference between proceedings in a *Statute merchant* and *Statute ſtaple*.

The proceedings in a *Statute merchant* is a *Capias*, and if the ſheriff thereupon return a *Cepi corpus*, then he ſhall remain in priſon a quarter of a year, within which time he may ſell his goods and lands to pay his debts, and this by the expreſs words of the ſtatute of 15 *H.* 7. *c.* 16. but if the ſheriff return, *Non eſt inventus*, execution ſhall be granted of his lands and goods.

Statute ſtaple, further remedy.

But in a *Statute ſtaple* and recognizance, the firſt proceſs is to take his body, lands, and goods, all in one writ; for this is by the expreſs words of the ſtatute, and is a more ſpeedy remedy than the *Statute merchant*.

Coniſor dead.

Now on a *Statute ſtaple* and recognizance, the writ of execution, upon return of the coniſor dead, is is to extend the lands *necnon catalla*, which were of the coniſor at the time of his death: and this is the

conſtant courſe, as appears by records of *Extents* which are in the *Rolls*.

Non eſt inventus. On extent of a *Statute merchant*, the ſheriff returns, that the body cannot be found, and that he had extended the lands, and delivered them to the plaintiff. *Reg.* 146.

The ſheriff may return *Non eſt inventus, nec habet bona nec terras:* the ſheriff returned the coniſor *mortuus*. *Dy.* 299.

Clericus. Upon extent of a *Statute merchant*, or *Staple*, the ſheriff may return, that the debtor is clerk. If he return *Tarde*, or *Mandavi ballivo libertatis*, he ſhall be puniſhed. *Tarde.*

Ancient demeſne lands. Lands in ancient demeſne ſhall be taken in execution on a ſtatute, but not copyhold lands. 4 *Co.* 67. 5 *Co.* 105.

Fee-ſimple. Where the debt of the coniſor appeareth in the return, there of neceſſity his ſeiſin muſt be found to be of an eſtate in fee-ſimple only. *Dy.* 299.

Recognizance. Execution upon recognizance *per* ſtat. 32 *H.* 8. c. 6. hath the effect of a *Statute ſtaple*.

Return inſufficient. Extent on a *Statute merchant* iſſued out againſt *R.* the coniſor; the ſheriff returned, that the coniſor was poſſeſſed of divers goods, and ſeiſed of lands, which he delivered to the coniſee, and that the coniſee accepted of the lands; and becauſe the ſheriff did not return, that he had not any other lands, goods, or chattels, it was adjudged inſufficient, and a new writ awarded; though ſome held it was well enough in the caſe of a coniſor, but not in the caſe of a purchaſer. *Brownl.* 37. *Nulla alia terr', &c.*

Puniſhment of ſheriff. If the ſheriff do not return the *Capias*, or return *Tarde*, or that he directed it to a bailiff of a franchiſe, he ſhall be puniſhed, and yield damages to the party grieved, according to the ſtatute of *de Mercatoribus*, *W.* 2. *c.* 39.

Two inquiſitions upon one ſtatute. Two inquiſitions taken at ſeveral days by ſeveral juries upon one *Statute merchant*, were adjudged naught; one was taken of the lands, and the other of the lands and goods. *Brownl.* 38.

If the lands be in execution. If another had theſe lands in execution by *Elegit*, or is in by diſcent; in ſuch caſes the ſheriff ſhall

return

return the ſpecial matter, *i. e.* in the firſt caſe, that he hath extended the land of the defendant; but he cannot deliver the ſame to the plaintiff, for that another had the ſame in extent before.

Gathering the goods.

The ſheriff having an extent upon a ſtatute, may gather the goods all into one place to be viewed and appraiſed by the jurors, and he is not a treſpaſſer. *Mo.* 563. *pl.*

Scire fac', and new writ of *Execution*, where.

If lands delivered in execution (on a *Statute merchant*, ſtaple or recognizance, or upon recovery of debt and damages) are lawfully recovered or evicted out of the poſſeſſion of the coniſee, before his debt and damages be ſatisfied, he ſhall have *Scire fac'*, *&c.* and upon this a new writ of *Execution* or *Re-extent*, to levy the reſidue, *per* ſtat. 32 *H.* 8. *c.* 1. *Co. Lit.* 289, 290. 5 *Co.* 87.

Returns on *Scire facias.*

Scire facias is a writ judicial, directed to the ſheriff, *&c.* and is uſually to warn a man to come and ſhew cauſe to the court, *&c.* why execution of a judgment ſhall not be done. But this writ ſhall not be granted before the year and day paſt, after judgment given.

Return not agreeing with the writ.

Coniſor in a recognizance dies, *Scire fac'* goes againſt his executors, *&c. hæredes terrarum*, *&c.* ſheriff returns, that he had no executor; & *Scire feci* W. H. *filio & hæredi prædict.* M. *(le coniſor.)* This return agrees not with the writ, yet it may be good. 3 *Co.* 15.

Sur recog. in Canc'.

Scire fac' on a recognizance in *Chancery* againſt *C.* who was returned dead, then a ſecond *Scire fac'* iſſued againſt the heir of *C.* and againſt the tenants of the lands of *C.* which he had *tempore recognitionis vel poſtea.* The ſheriff returned *C.* tertenant, and omitted to return any thing againſt the heir. This is a non-return of the ſheriff, and not a miſ-return, and is not aided by any of the ſtatutes of 32 *H.* 8. or 18 *Eliz.* or 21 *Jac.* of *Jeofails.* It is error; the tertenant, without the heir, ought not to be charged: therefore the heir ought to be ſummoned, for the heir may have a releaſe to plead, or other matter to bar the execution. Alſo if the heir be within age, the parol ſhall demur, and the tertenant ſhall

The heir muſt be ſummoned as well as tertenant on a recognizance.

ſhall have advantage thereof. And a new *Scire fac'* iſſued *ad informand' curiam*; and the return was, that he had not any lands in his bailiwick that deſcended to his heir, nor any heir within his bailiwick: and good enough, though it had been better if he had returned who was heir, and that he was warned, or that there was not any heir in the ſaid county. *Cro. Car.* 295. *pl.* 4. 11 *Vin. Abr.* 19. *pl.* 18.

The writ commands the ſheriff to give notice to the tertenants of the land in fee-ſimple, and the ſheriff returns not, that thoſe which he had not returned were tenants of the land in fee-ſimple, and ſo the words of the writ are not anſwered. *Brownl. Rep.* 145, 146. Words of the writ not anſwered in the return.

The ſheriff may return 24 tertenants of the whole, and every tenant may plead in diſcharge of himſelf; or he may return, that each is tertenant of ſo many acres. 2 *Keb. Rep.* 601. *pl.* 26. So many tenants.

Scire fac' to have execution on a recognizance. The ſheriff returns the coniſor dead; other *Scire fac'* iſſues againſt the tertenants of the coniſor, on which the ſheriff returns a *Scire feci* to *W.* and *R.* tenants; and further, that there was no heir, nor any other tenants, *quibus Scire fac' poterit, & la forme.* 2 Keb. Rep. 621. pl. 12. Gouldſb. 45. pl. 26. Coniſor returned dead.

Scire facias againſt the heir and tertenants. The ſheriff returns no heir, and the tertenants appear, *& la form.* *Nullus hæres.*

Scire facias to tertenants. The ſheriff returns they are ſummoned, *la forme.* 2 *Saund.* 6, 8, 232. Tenants ſummoned.

Scire fac' ad audiend' errores muſt be delivered to the ſheriff. *Rol. Rep.* 329. *Scire fac' ad audiend' errores.*

If a ſpecial *Scire facias* do iſſue forth, a *Nihil* cannot be returned upon it, for *Nihil* is a general return, and the writ is ſpecial. Special *Scire fac'* ret'.

The return of the ſecond *Scire fac'* ought to bear date on the return of the firſt *Scire fac'*. *Ret.* of the ſecond *Scire fac'*, when to bear date.

Two *Nihils* returned, countervail *Scire fac'*.

To *Scire fac' ſur recogniſans*, ſheriff returns, that the defendant is dead.

Scire

Scire fac' vid. tertenants. The ſheriff returns they are ſummoned. 2 *Saund.* 8.

Return at 4° *die poſt.*

Motion againſt under-ſheriff *Greenaway*, for not returning a *Scire facias*; and it was inſiſted, that being returnable at a return day, and not at a day certain, he need not return it till 4° *die poſt.* So the court did nothing. *Forteſc. Rep.* 363.

The manner of ſuing to the outlawry.

He which is ſued in a perſonal action, if he do not appear on the mean proceſs, then the *Exigent* is directed to the ſheriff to call and proclaim him in five county-court days, one after another, to anſwer to the law; and when upon the *Exigent* the ſheriff returns *quod non comparuit*, upon his return the plaintiff ſhall have a *Cap' utlagatum* againſt the defendant; but if the defendant appear upon the *Exigent*, he ſhall have a *Superſedeas.*

Return *reddidit.*

Where upon the *Exigent* the ſheriff returneth *reddidit ſe*, he muſt have the body in court at the day of the return, except the party be ſick.

Coroners abſent.

The ſheriff may return the coroners were abſent.

Bailiff of a franchiſe cannot execute it.

A *Capias utlagatum* is a *Non omittas* in itſelf, and therefore the bailiff of a liberty cannot execute a *Cap. utlagat.* and if the party be in the hands of the bailiff, the ſheriff may take him.

Sheriff not to put the party out of poſſeſſion.

If a *Capias utlagatum* iſſues to the ſheriff to take the party, and to inquire what lands and tenements he had, the ſheriff finds by inquiſition that he is ſeiſed of many lands, and continues poſſeſſion in them, he cannot put the party out of poſſeſſion by force of that. *Winch* 78.

Return as to the huſtings in *London.*

An outlawry returned in *London* in theſe words: *Ad huſting. tentum in* Guildhall *civitatis* London *tali die* A. B. *exactus fuit & non comparuit.* This is no good return, becauſe there are two huſtings in *London*; one is *de communibus placitis*, and the other is *de placitis terræ:* in ſuch caſe the return muſt be, *apud huſting de communibus placitis.*

Return where the city is city and county.

The city of *Norwich* is within the county of *Norfolk.* Alſo it is a county in itſelf, which may hold plea; and therefore if a return be made in theſe words, *Ad com' tentum apud Norvicum in com' Norfolc'*, this is not good, for that it may have two intend-

ments,

ments, *(scilicet)* that the county which was held there was for the city, or for the county of *Norfolk*. But if the return be in these words, *Ad comitatum Norfolc' tentum apud Norwicum in comit' Norfolc'*, it is good, for now it cannot be intended, but only that their county was held for the county of *Norfolk*. 11 *H.* 7. 10. *b.*

In a *Cap. utlagat.* the sheriff returned, that the party who was arrested had a protection from a peer of parliament, it is ill; and day was given to the sheriff to amend his return. *Winch* 24. Protection returned.

Proclamation was directed to the sheriff of *Chester* against *J. H.* and the writ was returned, *Tali die ad comit' meum tent' en le Shire-hall, &c. proclamationem feci ac ead. die ad general' session', &c. proclamationem feci*; and this matter was pleaded in avoidance of the outlawry to reverse it, because the proclamations were made one day, and the writ was, *Tribus specialibus diebus, &c.* Proclamation returned.

Per curiam: It is an ill return, and the sheriff was amerced for it. *Goldsb.* 111.

By the custom of *London* the writ was directed to the sheriff of *London*, and not to the coroner, (who is mayor.) *London.*

The return of the outlawry out of *London* in *B. R.* is generally made without saying, *per judicium coronat'*. 2 Rol. Abr. 806. Return outlawry.

Error to reverse an outlawry in the county of *Lancaster*, for that the sheriff returned, *Quod ad com' Lancastriæ tent. ibid.* where it should have been, *Ad com' Lancastriæ tent. apud Lancaster*, or at some other place certain, and it was reversed. 9 *Co.* 94. *Dy.* 105. Error.

The *Exigent* was returned, *Ad com' tent. apud castrum de Exon' primo exactus fuit, &c.* and because it was not set down in what county, it was held to be erroneous. Return *Exigent.*

One was returned outlawed, and for that it did not appear that it was *per judicium coronatorum*, it was reversed, and that without any writ of error. Reversal.

The judgment is, *Idea utlagat' coronator', &c.* Inst. 288.

The

The profits of lands of the perſons outlawed in perſonal actions, the ſheriff may ſeize without any officer, and alſo the goods.

Outlawry reverſed in *B. R.* without bail.

" No perſon outlawed in the *King's Bench* for any cauſe, (treaſon and felony excepted) ſhall be compelled to appear in perſon, but may appear by attorney, and reverſe the ſame without bail, except where ſpecial bail ſhall be ordered by the court." 4 & 5 *W. & M. c.* 18. *ſect.* 3. 2 *Stra.* 1178. 12 *Mod.* 549.

So that a perſon outlawed (except as aforeſaid) may now appear by attorney, and then ſome friend, or his ſaid attorney, muſt undertake to pay the fine and his fees, and then the outlawry may be reverſed.

Reſcue returned.

But 'tis held, that this act does not extend to a reſcue returned, *&c.*

No goods, *&c.* ſhall be taken in execution, unleſs the party, before removal thereof, pay the landlord the rent due.

" No goods upon any tenements leaſed ſhall be taken by any execution, unleſs the party at whoſe ſuit the execution is ſued out, ſhall, before the removal of ſuch goods, pay to the landlord of the premiſſes, or his bailiff, all money due for rent for the premiſſes, provided the arrears do not amount to more than one year's rent; and in caſe the arrears ſhall exceed one year's rent, then the party at whoſe ſuit, *&c.* paying the ſaid landlord or his bailiff one year's rent, may proceed to execute his judgment; and the ſheriff is required to levy and pay to the plaintiff, as well the money paid for rent, as the execution money." Stat. 8 *Ann. c.* 14. *ſect.* 1.

Executor within the act.

The executor of a landlord, after the death of his teſtator, had rent due, and the goods of the tenant were taken in execution, and the executor gave notice before the removal of the goods, and it was determined by the court, that an executor ſhould have the benefit of this act, as well as the landlord himſelf, for it is an intereſt veſted. *Forteſc. Rep.* 359, 360. *Stra.* 214.

Goods were taken in execution, and the money levied, then adminiſtration was taken to the landlord, who died inteſtate, and the adminiſtrator moved the court to have a year's rent; but it was determined, that as execution was executed, he was too late

late. *Forteſc. Rep.* 360. *Stra.* 97, 214. *Gilb. Eq. Rep.* 223, 224. But *Powis* J. *e contra*, who held that execution was not to be ſtayed unleſs there was notice; but held that in this caſe the adminiſtrator was intitled to it, becauſe the 8 *Ann. chap.* 17. ſays, that no goods, *&c.* ſhall be liable to any execution, unleſs before the removal of them the party ſuing ſhall pay, *&c.* which words he held bound the goods with the rent arrear in reſpect of the party ſuing; ſo that though the ſheriff not having notice removed them, they continued bound in his hands, and upon application the arrear ought to be paid by him, and that if they were ſold, and the money delivered to the party ſuing, he became chargeable with the arrear. (*Quære*, What remedy the landlord could have againſt the party ſuing after execution perfectly executed?) He alſo held that the adminiſtration ſhould have relation to the death of the inteſtate, becauſe by the eccleſiaſtical law it is not to be granted within 14 days of an inteſtate's death; which the other juſtices denied, and ſaid that relations being fictitious ought not to hold place againſt the rights of ſtrangers. It was agreed *per tot. Cur'*, That though the landlord be the only perſon mentioned, to whom the arrear is to be paid by the party ſuing, executors and adminiſtrators being the perſons upon whom the right to the arrears devolves are within the ſtatute; and ſays that *Powis*'s opinion ſeems to be better grounded than that of the other juſtices; for the ſtatute was made for the benefit of the landlord only, and with deſign to prefer his year's rent in arrear to the execution, and the words of the ſtatute, *viz.* unleſs the party ſuing execution ſhall before the removal of the goods pay to the landlord, *&c.* then the party ſuing execution, paying to the landlord, *&c.* may proceed, *&c.* ſeem plainly to make it incumbent upon the party ſuing to take notice whether there be a landlord, and what rent is arrear; and if by the removal of the goods without notice the landlord ſhall be excluded from demanding the rent in arrear, the ſtatute will be almoſt ineffectual, ſince the landlord cannot but be preſumed to be a

ſtranger to the proceeding againſt his tenant. 11 *Vin. Abr.* 133. in notes.

Adminiſtrator within the act.

Caſe by the plaintiff as adminiſtrator of *J. S.* againſt the defendant as bailiff of the liberty of the dutchy of *Lancaſter*, for executing a *Fieri facias*, and removing the goods off the premiſſes before the landlord was paid a year's rent, purſuant to the above ſtatute; the general iſſue pleaded, verdict and judgment for the plaintiff; a writ of error brought, and upon the general errors being aſſigned, the judgment of the *Common Pleas* was affirmed. *Stra.* 212. 11 *Vin. Abr.* 134. *pl.* 30.

Landlord's rent to be paid without any deduction.

Upon an execution againſt the defendant, the court was moved on behalf of *Sadler* the defendant's landlord, for a rule on the ſheriff, to levy and pay him a year's rent; and the queſtion came upon this, Whether the ſheriff was to have his poundage, and from whom? After ſeveral motions, the court made a rule for him to pay the landlord without any deduction. *Stra.* 643.

Ground landlord cannot come in for rent on an execution againſt an under leſſee.

Motion for a rule on the ſheriff to pay the ground landlord of an houſe, in which an under leſſee dwelt and againſt whom an execution was ſued out, a year's rent purſuant to the above act; but it was held, that this was not a caſe within the ſtatute which extends only to the immediate landlord. *Stra.* 787.

Where there are two executions landlord cannot have a year's rent on each.

After the landlord had a year's rent paid out of the execution money according to the above ſtatute there came in another execution, and the ſheriff refuſing to levy him another year's rent, he moved the court for a rule, but was denied; for the intent of the act was only to continue a lien as to one year and to puniſh him for his *laches*, if he let more rent in arrear. If he had any thing to ſupport his demand, he might bring an action againſt the ſheriff. 2 *Stra.* 1024. *Andr.* 219.

Where land is let for a year, and afterwards will for leſs rent than before, and both rents are payable half-yearly, and at the end of the firſt half year under the laſt demiſe, an execution comes, the landlord

landlord is intitled only to the two laſt half-year's rent. *Andr.* 218.

Where land is let for a year, and then part thereof at will, and an execution comes, the landlord is not intitled to any part of the firſt year's rent. *Andr.* 218, 219.

This act not to hinder the queen, &c. to levy, &c. any debts, fines, &c. due to the crown.

" There is a proviſo in the above act of 8 *Ann.* that nothing in the act contained ſhall extend, or be conſtrued to extend, to let, hinder, or prejudice her majeſty, her heirs, or ſucceſſors; but that it ſhall and may be lawful for her majeſty, her heirs and ſucceſſors to levy, recover, and ſeize ſuch debts, fines, penalties, and forfeitures, in the ſame manner as if the act had never been made; any thing, &c." Stat. 8 *Ann.* c. 14. *ſect.* 8.

Landlord not relieved where goods are ſeized upon an outlawry.

Southerby was outlawed, and an *Extent* iſſued, and an inquiſition was taken thereupon, and his houſe and goods ſeized by virtue thereof. *Etchins* the landlord moved upon the ſtatute of 8 *Ann.* to have the goods delivered to him, ſuggeſting that they had been diſtrained by him for rent three days before the *Extent*. It was held, that not the party, but the King, was only concerned in the outlawry, and the landlord was not relieved upon the motion. *Bunb.* 5. *pl.* 5. The ſame motion was made in *Mich. term.* 1717. but defendant was not relieved. *Ibid.* A note of the reporter.

Extent coming after diſtreſs for rent, before ſale of the goods, a contempt to oppoſe it.

An *Extent* bearing date the 4th of *November*, iſſued againſt *Dale*, by virtue of which, corn and hay were ſeized; but *Mitchell* the landlord having diſtrained the ſame for rent the 29th of *October* before, refuſed to let it go; upon which an attachment was moved for againſt *Mitchell*, the goods not having been ſold within five days, purſuant to the ſtatute of 2 *W. & M. ſeſſ.* 1. *c.* 5. no property was deveſted by the diſtreſs, and they were in the landlord's hands only by way of pledge: but an attachment was refuſed for the reaſons in the report. *Bunb.* 42. See *Dy.* 67. *Rol. Abr.* 673. *pl.* 8. *Noy* 119. *Vent.* 37. *Cro. Car.* 148. 2 *Saund.* 47.

Extent againſt tenant, landlord not relieved.

Upon the 12th of *February* 1728. an *Extent* iſſued againſt *Prichard*, tenant of *Sambrook*; the 22d of

April 1729. *Sambrook* diſtrains for rent; 30th of *April* 1729. the inquiſition finds the goods then in the poſſeſſion of *Pritchard*. Note; The *Extent* was not executed till the 23d of *April*, the day after the diſtreſs. Motion that *Sambrook* might have the benefit of the ſtatute 8 *Ann.* for his rent, notwithſtanding the *Extent*; but denied. *Bunb.* 269. *pl.* 345.

For more of Execution, ſee L. C. B. *Gilbert's Law of Executions.*

CHAP. XIV.

Reſcue.

If reſcue in the arreſting.

IN the arreſting the party is reſcued, be it on execution or mean proceſs, no action for this lies againſt the ſheriff: and if the priſoner be arreſted on meſne proceſs, and as he is bringing to the gaol he is reſcued, no action lies againſt the ſheriff, for the ſheriff cannot be ſuppoſed to have the *Poſſe comitatus* upon every mean proceſs; *aliter* if it be upon execution, there *Caveat vicecomes.* But if he be arreſted upon mean proceſs, and brought to the gaol, then it is no good return for him to ſay, the gaol was broken, and ſo he was taken from him. And therefore action on the caſe was brought againſt the ſheriff of *London* and *Middleſex* on eſcape; they plead they have taken the party on a *Latitat*, and that in bringing him from *Iſlington* to the gaol, reſcous was made of him from them, and ſo return the reſcous. 2 *Bulſt.* 198. *Cro. Jac.* 419. *Mi* 852. *Cro. El.* 868. *Noy* 40. *Rol. Rep.* 388 *Rol. Abr.* 98. *Poph.* 192.

If in bringing to gaol on mean proceſs.

If brought to the gaol.

Reſcous in bringing.

Per Cur'; The plea and return is good, notwithſtanding *Waldoe* and *Lambert's* caſe, 44 *Eliz. B. R.* and that upon the former differences; and the difference between meſne proceſs and execution was inforced in this caſe. If the ſheriff takes one in execution

execution for debt, and after he ſuffers him to eſcape, the debt is gone, and the proceſs ſerved; therefore in ſuch caſe, if he ſhould not have his remedy by way of action againſt the ſheriff, he ſhould be without remedy; but not ſo in mean proceſs, for there the party may be taken again. See 6 *Mod.* 141. Difference betweeen mean proceſs and execution.

Action of debt lies againſt the ſheriff upon a *Cap'* returned *Qd' cepit corpus*, and he was reſcued. 2 *Rol. Rep.* 57, 58. *Cepi corpus* and reſcue.

No *Reſcous* can be on a *Fieri fac'* for goods, but in ſuch caſe the party ſhall have action on the caſe: and a *Reſcous* lies only on a *Capias* which lies againſt the perſon, and *Cro. Car.* 515. *Sly* and *Finch*'s caſe, which is full as to the point, and was as follows. *Lit. Rep.* 297. *Hetly* 145. Not on *Fieri fac'*.

Scire fac' was brought againſt *Finch*, ſheriff of *Glouc'*, for that the plaintiff having brought a *Fieri fac'* directed to *Finch*, he returned that he had taken goods into his hands to the value of 72 *l.* and had ſold as much of them as amounted to 11 *l.* and the reſidue remained *pro defectu emptorum* till ſuch a day, at which time he putting them to ſale, they were reſcued from him; upon which return the *Scire fac'* was brought to ſhew cauſe, why the remaining debt ſhould not be levied on his goods: to this the defendant demurs. All agreed that the return is not good: but the queſtion was, whether he hath charged himſelf by this writ. *Cro. Car.* 515. *Saund.* 340, 343. 2 *Keb. Rep.* 789. *pl.* 27. 821. *pl.* 32. That he had taken goods to ſuch a value. And part was reſcued at the ſale.

And *per Cur'*; He is chargeable by this return. If he had returned only *Qd' remanent pro defectu emptorum*, therein had he done his office, and in ſuch caſe on the election of a new ſheriff, a *Diſtringas vicecom'* ſhall iſſue to ſell the goods, and to deliver the money to the new ſheriff. But when he ſaith further, that they were reſcued out of his hands, therein he hath miſdemeaned himſelf: and by *Dodderidge*, the ſheriff hath charged himſelf by this return, as well in regard of his miſdemeanor, as alſo that he hath his remedy over againſt the reſcouſſers; nor can the court award a writ of *Vendit' exponas*, becauſe it is againſt his return. But if it be objected, that perhaps Where the ſheriff makes himſelf chargeable by his return. *Vend' expon'*.

haps he had ſeized the goods again, ſo as he may ſell them on a *Vendit' exponas*, if ſo, then he ought to have pleaded it to the *Scire fac'*, and it had been good.

Plea.

If action againſt the parties that reſcued.

It was a great queſtion, if one ſhould have action againſt the parties that reſcued? Three judges were of opinion he ſhould, though it was well objected, if he ſhall have action againſt the party, he ſhall alſo have action againſt the ſheriff, and ſo be twice ſatisfied; and the ſheriff ſhall have action againſt the party, and ſo he ſhall be twice charged.

Election of action.

By *Richardſon*, a man in ſome caſes ſhall have election of action, and both are but to recover damages; a man had an execution againſt one, another ſaw the man and conveyed him out of ſight; action on the caſe lies againſt him, and perhaps the ſheriff is dead, and he ſhall have no remedy.

Caſe lies.

Harvey ad idem: The law gives a man remedy againſt the party that doth the wrong. If an action on the caſe will lie for hindering a ſheriff in executing of his office, *a fortiori* when it is actually done, and he is reſcued out of cuſtody.

Action will lie.

Cro. ad idem; That the action will lie; there is a miſchief on both ſides; the defendant may be twice charged, and the plaintiff may loſe his debt; and if the ſheriff brings the action, he may plead the recovery by the plaintiff. When the ſheriff has made his return of the *Reſcous*, there is no remedy againſt him; and if the party taken be reſcued before he be brought to the gaol, there is no remedy againſt the executors of the ſheriff. If debt be brought againſt the ſheriff, and in that a recovery, the plaintiff ſhall never take the defendant again; and ſo if he bring action againſt the party and recovers, the ſheriff may plead that; and *F. N. B.* 12. is doubtful.

Contra, and difference.

Hutton contra; That the action doth not lie. The difference is good where a man is arreſted upon mean proceſs and reſcued, and after becomes nonſolvent, ſo that they who reſcued him are the cauſe of the loſs of my debt, it is a wrong upon which he may be indicted, yet the party ſhall not have remedy againſt

againſt him, becauſe he may proceed. *Yelverton* of the ſame opinion, and agreed the difference.

By *Hutton*; Upon mean proceſs the ſheriff never had remedy for the *Reſcous*, but he ſhall return the *Reſcous*; but upon execution he ſhall not return the *Reſcous*, but have an action, and the party is not prejudiced, for he ſhall have an action againſt the ſheriff, though in judgment of law the party is liable. Sheriff has no remedy on mean proceſs.

The reſcouſer ſhall be doubly puniſhed, by the King, and by the party; upon the return of the ſheriff, he ſhall be fined to the King, and attachment ſhall iſſue out againſt him, and the party ſhall have a writ of *Reſcous* againſt him, and ſo ſhall the ſheriff too. Where the reſcouſer ſhall be doubly puniſhed.

Action on the caſe lies againſt the party that reſcouſed, by the party who had the loſs, and he ſhall not be forced to ſue the ſheriff, for perhaps the ſheriff is dead, and then no action lies againſt his executors (*actio perſonalis moritur, &c.*) and if the plaintiff recover, the parties may plead it, if they be ſued by the ſheriff, ſo as there is not any danger of being doubly charged; ſo in *Hopping*'s caſe, 2 *Keb.* 340. action on the caſe lies againſt the reſcuer as well as the ſheriff. But as to the caſe of *Myn* and *Cunningham*, which was full to the point, and the reaſons in reſpect to this, and other caſes of like nature are weighty: I have ſet down as it is in the book, with the reaſons of the judges that differed in opinion. *Cro. Car.* 109. 2 *Keb. Rep.* 340. *pl.* 8. Caſe againſt the reſcouſer. Who may plead recovery againſt ſheriff.

The defendant *B. S.* out of the bailiff's hands, when the ſaid *B. S.* was arreſted by *Alias capias* out of the *King's Bench*, which writ is only in the nature of a plea in treſpaſs; the party who reſcued him ſhall anſwer in this action damages for the debt, which was 300 *l.* becauſe by this means the defendant loſt his debt; but if the ſheriff or bailiff in this caſe had only ſuffered a negligent eſcape, they ſhould be charged only with the damages in the ſame plea as the writ ſuppoſeth, and nothing for the debt. *Lane's Rep.* 70. What damages the reſcouſer ſha anſwer.

Reſcue s indicted and errors aſſigned.

Error was brought to reverſe an indictment of *Reſcous* and *Riot*, and the errors aſſigned were:

1. There was a warrant to three *conjunctim & diviſim* to arreſt *H.* and two of them arreſt him, it ought to have been by one, or all three, becauſe it is a miniſterial act.

2. *Juratores pro domino rege præſentant*, and do not ſay twelve jurors preſent, and peradventure but eleven did preſent. *Poph.* 202.

The names of the jurors ought to have been certified, for peradventure they were not *probi & legales homines*, but villains and outlaws. 15 *H.* 4. 41.

Per ſacramentum omitted.

An indictment before coroners, which found *B. Felo de ſe*, was quaſhed, becauſe it did not appear it was *per ſacramentum proborum & legalium hominum.*

It appears not what writ.

4. It is found that the ſheriff, by virtue of a writ directed to him, came, *&c.* and upon this *Reſcous* was made by *H. &c.* and it appears not what manner of writ it was, (*viz. Eleg. Capias, &c.*) and if there were no writ, there can be no *Reſcous*; and albeit he had no writ, yet if execution were done by virtue of another writ, the party may diſobey it, (if he be not a bailiff known) as if on *Hab' fac' ſeiſinam* the ſheriff makes a warrant as on a *Capias*. *Poph.* 202.

Sheriff miſtakes the warrant.

Appearance.

An indictment for a *Reſcous* returned againſt one in *B. R.* ought not to be quaſhed, although it be erroneous, except the perſon indicted for it do perſonally appear in court. 2 *Lil. Abr.* 573.

Indictment not to be uncertain.

Indictment of *Reſcous* ought to expreſs the place where, and the time when the *Reſcous*, or elſe it is ill for the uncertainty. 2 *Lil. Abr.* 573.

Return of reſcue.

A return of a reſcue, and four exceptions taken to it.

Firſt exception over-ruled.

1. That it is ſaid the bailiff by virtue of the warrant took the defendants and arreſted them, when by law it is the arreſt of the ſheriff; but it was over-ruled *per Cur'*.

Second exception over-ruled.

2. Not ſaid that the defendants, who were man and wife, were in the poſſeſſion of the bailiff; but ſaid only that the bailiff took and arreſted them, and being ſo arreſted, and being in my cuſtody, they were reſcued

reſcued out of my cuſtody; this was held well *per Cur'*, for that *exiſtentes in cuſtodia* was an affirmative.

3. Objected, that in the return it is ſaid that *Parker* and *Mary* his wife *non ſunt inventi in balliva mea*, but do not ſay *quod uterque eoru' non eſt invent'*; for though it was urged that this part of the return did not concern the party injured, who was the plaintiff; yet *per Cur'*, We muſt judge upon the whole return, and this is an excuſe returned why he did not execute this writ; and the excuſe is not compleat, for he might not be able to find the wife, and yet might find the huſband, and the difference is between an affirmative and a negative in the nature of the thing; if you affirm of many you affirm of each, but it is the contrary in negatives. Third exception allowed.

4. That it is not ſaid *Vi & armis* they reſcued, but only *Vi & armis* to the aſſault; and for this I held the return naught, *ſilentibus* the reſt of the court. To ſupport the firſt reſolution, the caſe of *The King and Maſchal Cooks* was quoted, which confirmed my opinion alſo as to the *Vi & armis*. *Forteſ. Rep.* 362. Fourth exception not determined.

A warrant was from the ſheriff to the bailiffs of the liberty of *Pomfret*, who did execute it, and there was a reſcous: and the bailiff may have the action againſt the reſcuers in his own name; but he failed in proving it to be a *Liberty*, and was nonſuited, *&c.* And *Note*; he was put to it firſt to prove the liberty by records. *Clayton* 149. Of laying the action, declaration and pleadings.

B. brought a *Latitat tempore Eliz. ver. E.* who was ſerved in the time of King *James*, and *E.* reſcued himſelf, and the reſcue was returned by the ſheriff of *Eſſex*. *Per Cur':* This is good; for a *Latitat* is within the ſtatute of 1 *Ed.* 6. and is not loſt or abated by the demiſe of the *Queen:* for it is not any original writ, but is in the nature of an execution, grounded on a record precedent, *viz.* upon a bill of *Middleſex*, ſo that the *Latitat* iſſues upon a ſuit depending; and the arreſt was good, and ſo the reſcous. *Yelv.* 52. Arreſt in one King's time, and reſcous in another. *Latitat*, the nature of it.

In

How to declare and ſhew the time of the arreſt, &c.

In the declaration, the time of the arreſt muſt be ſhewed upon which the *Reſcous* is ſuppoſed to be made; and it muſt be ſhewed, that the party *reſcouſed* was in cuſtody of the ſerjeant or ſheriff from whom he was reſcued. *Styl. Rep.* 432.

That he ſued out a *Latitat*.

The plaintiff declares, whereas one *S.* was indebted to him by bond in 300*l.* and for nonpayment he ſued a *Latitat* out of the *King's Bench* directed to the ſheriff of, &c. to arreſt him, returnable at ſuch a day, intending upon his appearance, and bail put in according to the courſe of the court, to declare againſt him, (and ſhews the courſe and cuſtom of the court, that he upon appearance ſhould put in good bail, that if judgment were had againſt him he ſhould ſatisfy the condemnation, or render his body in execution), that he delivered the writ to the ſheriff of *Nott'*, who made a warrant to the bailiff of the King's liberty of *Newark* to execute it; which warrant was delivered to *L.* deputy of the lord *Burleigh*, *ballivi libertat' domini regis Wapentagii ſui de Newark*; who by force thereof arreſted the ſaid *S.* that the defendant reſcued him out of the cuſtody of the ſaid deputy, and he he eſcaped, &c. Errors moved in the *Exchequer Chamber*.

Writ delivered to the ſheriff.

Warrant to bailiff, &c.

Reſcous.

Errors.

Firſt, Becauſe the cuſtom of the *King's Bench* is alledged to be, that if any one arreſted comes *ſub cuſtodia vicecomit'*, he ſhall put in bail, which is not ſo, for he ſhall be *in cuſtod' marr'*, and no declaration can be againſt him *ſub cuſtodia vicecomitis*. But *non allocatur*, that which is alledged of the court is idle.

Cuſtom of the court.

That he was reſcued from the deputy of the bailiff of a liberty, good.

Secondly, It is ſaid he was reſcued from the deputy of the bailiff; where it ought to have been from the bailiff himſelf, or from the ſheriff: *Sed non allocatur'*, for there is a diverſity in this caſe, which is an action on his caſe, wherein he ſhall ſhew the truth, as *in rei veritat'* it is, and not as it is upon the returns of reſcues and indictments, which ſay it is done to the ſheriff or bailiff himſelf. *Cro. Jac.* 241. like *Lane's Rep.* 70. In that caſe it was declared, that the bailiff of a liberty arreſted the party, and delivered him to the ſheriff's deputy, and that he

he reſcued him from the ſheriff's deputy. *Dy.* 244. and judgment *pro querente* in that caſe, and in *Lane's Rep.* 70. in the ſame caſe ſaith, that the courſe of the *King's Bench* is always ſo in return of a *Reſcous*, to be out of the hands of the deputy bailiff; notwithſtanding *Dy.* 241. and the declaration was held good, that he ſued an *Alias capias*, without mentioning a *Latitat*, before this arreſt was made by the deputy bailiff of *Newark*. But the main queſtion was, becauſe it doth not appear, that the bailiff had a power in his patent to make a deputy bailiff.

The action is brought in *Suffolk* againſt the ſheriff of *Suffolk*, for arreſting the defendant in the firſt action upon a *Capias utlagat'*, and ſuffering him to eſcape, and the defendant in the firſt action is named of *S.* in *Com' Norfolk*, and the arreſt is ſuppoſed *apud S. prad'*, ſo the arreſt is ſuppoſed in the county of *Norfolk*, and then it is *Tortious*, and there is not any eſcape thereon. *Per Curiam:* It is an incurable error. *Cro. Eliz.* 877.

No eſcape upon a *tortious* arreſt.

Error incurable.

In an action on caſe on a *Reſcous*, the plaintiff declares, that *A.* was indebted to him by obligation of 20 *l.* and that he ſued a writ againſt him directed to the ſheriff of *Cornwal*, to take *A. &c.* and that the ſheriff 1 *Oct.* 6 *Car.* arreſted him at *L.* in *Com' Cornub'*, and after the defendant at *Weſtminſter*, the *prad'* 1 *die Octob.* reſcued him out of the cuſtody of the ſheriff; and on *Non culp'* verdict and judgment *verſ. Quer.* he brought error and aſſigned this for error, for that it was impoſſible he ſhould be arreſted at *L.* and the ſame day be reſcued at *Weſtm'* (200 miles diſtant), yet the court will not intend it to be impoſſible. But however, *ſee what reaſons the plaintiff ſhall have to* aſſign error on his own declaration. *Rol. Abr.* 523.

Declaration of arreſt at *L.* and reſcue at *W.* the ſame day, *&c.*

Treſpaſs on aſſault laid and tried in *Somerſetſhire*, the defendant juſtified by warrant to the ſheriff of *Dorſet*, and that the plaintiff endeavoured to reſcue himſelf, and iſſue *de injuria ſua propria*. *Gould* after judgment, becauſe within the words of 17 *Car.* 2. *c.* 8. there being three judgments in the point. 3 *Keb. Rep.* 496. *pl.* 51. *Leon.* 103. *pl.* 127. But the

Treſpaſs.

Perpetuated by 1 *Jac.* 2. *c.* 17. *ſ.* 5.

Trial ſhall be where the cauſe of action ariſeth.

the court were not ſatisfied with theſe judgments, and reſolved that the ſtatute intended the trial where the cauſe of action ariſeth. But there was a *Replead'*, becauſe the defendant traverſed, *abſque hoc*, that he was guilty *aliter vel alio modo*. The reply was, he was guilty *aliter & alio modo*, which was a wild iſſue. 3 *Keb. Rep.* 552. *pl.* 62. 612. *pl.* 68.

Diverſity between pleading reſcous in caſe, and debt on eſcape.

In action on the caſe on eſcape upon mean proceſs, defendant pleads a *reſcous*. Ever ſince 6 *Car.* 1. it hath been held a good plea. *Per cur'*; If it be returned, it is a good plea, and it need not be averred in the plea that it was returned. But in debt on eſcape it is no plea. 3 *Keb. Rep.* 513. *pl.* 68.

If Not guilty, may be pleaded to the return.

In an action on the caſe for a *reſcous*, one may traverſe, &c. but *quære*, if Not guilty may be pleaded to the ſheriff's return of a *reſcous*. *Keb. Rep.* 258. *pl.* 35.

On *Scire fac'* in debt, bar that he was formerly taken on a *Ca' ſa'*, &c.

Scire fac' to have execution of a judgment in debt. Defendant pleads, that at another time the plaintiff had ſued execution by *Capias ad ſatisfaciend'*, and that he was taken thereupon; plaintiff replies, true it is, he ſued a *Ca. ſa.* and the defendant was taken thereupon, but he preſently reſcued himſelf and eſcaped. Replication is good, as there is no cauſe for the defendant to have *Audita querela* when he is eſcaped and taken again, unleſs it be for a voluntary permiſſion by the ſheriff; ſo there is not any bar for the plaintiff to have new execution. And though it is no good return on a *Ca' ſa'* that the defendant reſcued himſelf (for the ſheriff at his own peril ought to have kept him), nor any plea in debt on eſcape, yet the party himſelf ſhall never take advantage of his own tortious act. And *Scire fac'* after the year is well maintainable. *Cro. Car.* 240, 255.

Altering *Venue*.

Action on the caſe on *Reſcous* is out of the common rules of the court to alter the *Venue*; but it is in the diſcretion of the court, on circumſtances, to alter it: as action brought againſt a bankrupt may be brought in the county, or here where the commiſſion is awarded. *Keb. Rep.* 346. *pl.* 26.

There is a difference between a warrant of record and a warrant or authority in law, for if a *Capias* be awarded

awarded to a ſheriff to arreſt a man for felony, albeit the party be innocent, yet cannot he make *Reſcous*. But if the ſheriff will, by authority which the law gives him, arreſt any man for felony who is not guilty, he may reſcue himſelf. *Coke Lit.* 161. *a.*

What fine. Four nobles fine is a general fine impoſed for a reſcue. 2 *Jo.* 198.

The wife eſcaped out of execution. In debt *ſur eſcape ver. vic'*, plaintiff declares, that *J. S.* and his wife were in execution, and that ſhe eſcaped. On *Nil debet*, ſpecial verdict found, that the baron was in execution, and that he eſcaped; and further, that the wife was not taken in execution, (being for debt contracted before coverture) yet judgment *pro quer.* the verdict was not in the whole purſuant to the declaration, becauſe they found the huſband eſcaped. *Sid.* 5.

Found by the jury upon a *Reſcous*. In action on the caſe upon a *Reſcous* and eſcape, the jury found the debt due to the plaintiff, the proſecuting the *Latitat* for this cauſe, the making the warrant hereupon to the ſheriff, *&c.* *Cro. Jac.* 485.

Reſcuer diſcharged. In the caſe of a *Reſcuer*, there are two ways of proceeding for his diſcharge; 1. If the reſcue is returned to the filazar, and proceſs of outlawry iſſues, and the reſcuer is brought into court, he ſhall not be diſcharged on affidavits: but where upon the return of a reſcue an attachment is granted, and the party examined on interrogatories, there, upon anſwering them he ſhall be diſcharged. 2 *Salk.* 586.

On affidavits.

Attachment not granted on affidavits. Upon an affidavit of a reſcue on meſne proceſs, an attachment was prayed againſt the reſcuers, but denied; for by *Holt*, the reſcue muſt be returned on the writ, and the motion and attachment founded upon that: but it is never granted on affidavits. 2 *Salk.* 586.

CHAP.

CHAP. XV.

Eſcapes.

Eſcape, what.

ESCAPE is where one that is arreſted, or impriſoned on the arreſt, comes to his liberty before he is delivered by order of law.

Negligent and voluntary.

1. Between a negligent and a voluntary or permiſſive eſcape. A permiſſive or voluntary eſcape is by the aſſent, privity, and knowledge of the ſheriff, gaoler, &c, whether the priſoner may be retaken or not.

Mean proceſs and execution.

2. Between an eſcape on mean proceſs, and on execution, in eſcape upon the arreſt by the ſame proceſs; as a *Cap' ad reſpondend'*, the writ ought to ſurmiſe *ad largum ire permiſit, & non comparuit ad diem*, becauſe the party was bailable, and the ſheriff might ſuffer him to go at large. *Aliter*, if the arreſt be upon execution, as a *Cap' ad ſatisfac'*, there *permiſit ire ad largum* is good enough. *Noy* 72.

Debt and felony.

3. Between an eſcape for debt, and for felony or treaſon.

By ſheriff and reſcouſers.

4. Between an eſcape by a ſheriff or bailiff, and an eſcape cauſed by reſcouſers. A reſcouſer ſhall be charged with the debt. The ſheriff or bailiff for a negligent eſcape ſhall be charged with the damages only in the ſame plea as the writ ſuppoſeth, and not with the debt. *Lane's Rep.* 70.

In fact and in law.

5. Between an eſcape in fact, and an eſcape in law; as where a man may be in cuſtody without actual arreſt.

Error and nullity.

6. Between error in the proceedings, and a nullity of the record, and how the ſheriff ſhall take advantage of either.

Teſtator and executor.

7. Between an eſcape in the life of the teſtator, and an eſcape in the time of the executor, upon execution in the time of the teſtator.

Judgment reverſed.

If judgment be reverſed before action of *Debt* brought for an eſcape out of execution, the action is

is gone. *Saund.* 38, 39. *Lev.* 191. *Sid.* 305. *pl.* 14.

The occaſion of ſo much liberty in the *Marſhalſea* is, that the marſhal is not chargeable but by bill, which muſt bear *teſte* in term time; and ſo in the former term the party is not eſcaped. And by the firſt day of the latter term the priſoner generally is to return to priſon, and ſo no remedy for the party. *Keb.* 794.

Occaſion of liberty in the *Marſhalſea*.

If a ſheriff hath in his cuſtody divers perſons in execution, and dieth in the time of his office, and after a new ſheriff is made; here the new ſheriff at his peril ought to take notice of all the executions which are againſt any perſon which he finds in the gaol: but this is by reaſon of the neceſſity, for that there is no perſon to make delivery of to him, or to give him notice; and beſides, the new ſheriff may take notice himſelf of all executions, they being upon record.

If a ſheriff dieth in his office, the new ſheriff muſt take ſpecial notice of all executions,

Alſo in the former caſe, the ſheriff (it ſeemeth) is to take notice of all other priſoners in the gaol, and of the cauſes of their commitment; and ſo the new ſheriff (upon the death of the old ſheriff, during the time of his office) is chargeable without either delivery of the priſoners, or notice of the cauſes of their commitment.

And of all priſoners.

And ſo it ſeemeth for the delivery of the writs, upon the death of the old ſheriff during the time of his office, the new ſheriff is to take notice of all other writs, (and of the contents thereof) which ſhall be in the hands of his predeceſſor, or his under-ſheriff.

And for the writs.

If a ſheriff die in the time of his office, and that before another is made ſheriff, there if a priſoner who is in execution ſhall break the gaol and eſcape, and go his way, yet this is no eſcape; for that by the death of the ſheriff, all his priſoners were in the cuſtody of the law, until a new ſheriff be made; and the priſoner may be taken again in execution at any time after whereſoever he ſhall be found.

Eſcape in the interval.

He may be taken again in execution.

But if ſuch priſoners ſhall be in the gaol at the time ſuch new ſheriff is made, there the new ſheriff (as ſoon as he is appointed by the King, or at leaſt

If in priſon at the time ſuch new ſheriff is made, he is as chargeable.

as ſoon as he has received his patent) ſeemeth to be chargeable preſently with them, without any delivery or notice made or given to him of the ſaid priſoners, or of the cauſes of their commitment; and if priſoners ſhall after get out of the gaol, this is an eſcape: yet if it be without the conſent of the new ſheriff, or his gaoler, then they alſo may be taken again at any time after.

Voluntary ſuffering one in execution to eſcape.

If the ſheriff, or any of his officers, do ſuffer any priſoner being in execution, to get at liberty before the debt be ſatisfied, the creditor may either have his action of debt againſt the ſheriff, and ſo ſhall recover his debt, or elſe the creditor may have an action of the caſe againſt the ſheriff.

Eſcape againſt the ſheriff's will.

But if the priſoner do eſcape of his own wrong againſt the will of his officer, although he eſcape and get out of ſight, or into any other county where the ſheriff or officer hath no authority, yet if freſh ſuit be made, and he be taken again upon the freſh ſuit, he ſhall be ſaid to be ſtill in execution. 3 *Cr.* 52.

Freſh ſuit.

Taken again before action for the eſcape.

And upon ſuch an eſcape againſt will, if he be taken again upon the freſh ſuit, before any action brought for the eſcape, it ſhall be adjudged no eſcape. 2 *Stra.* 873. *Barnard. K. B.* 354. *Com. Rep.* 554. *pl.* 231. And if the action be brought for ſuch an eſcape, yet the ſheriff may take the eſcaper again, and detain him in cuſtody till he hath made his agreement with the ſheriff, or elſe he may have an action of the caſe againſt him; and in theſe caſes he ſhall not be relieved, becauſe the eſcape was of his own wrong, and without the conſent of the ſheriff, or his officer.

Taken again after an action brought.

In cuſtody without actual arreſt, an action for the eſcape ſhall be good,

When a man is in cuſtody of the ſheriff by proceſs of law, and another writ is delivered to him to take him, preſently in the judgment of law, he is in cuſtody without actual arreſt, *quia lex non præcipit inutilia*; as *A.* recovered in debt, defendant was outlawed, and after the year the plaintiff procures a *Capias utlagat'*, and delivers it to the ſheriff of *London:* after the ſerjeant arreſts the defendant to anſwer *J. S.* before the ſheriff, the plaintiff delivers the

the ſheriff's warrant to the ſerjeant, (who had the defendant in the houſe) to arreſt the defendant; the ſerjeant refuſeth, and after the ſheriff ſuffers him to go at large. Plaintiff brought action againſt the ſheriff, ſuppoſing he had arreſted him, and defendant pleaded *non permiſit*, &c. 5 *Rep.* 89.

Priſoner not to be hurried away.

By *Windham* in *Benſkin*'s caſe: By law the bailiff ought not to hurry away any immediately to priſon, but he may call any other perſon in aid, and ſo may commit the priſoner to them. *Keb. Rep.* 483. *pl.* 17. *Sid.* 132. *pl.* 2.

Eſcape by aſſent, &c.

If by aſſent the ſheriff ſuffer one to go at large, no action lies for the eſcape. *Aliter*, if without conſent, and he may be taken again on freſh ſuit. 3 *Co.* 52.

Priſoner in execution, &c.

If a man in execution be ſuffered to go at large for a time out of the county, and to return again, and this upon bail or mainprize, yet this is an eſcape, for he ought to be kept *arcta cuſtodia*. So if he be ſuffered to go at large to any place within the county, and to return again; ſo if he be ſuffered to go at large within the ſame town where the priſoner is, it is an eſcape, though he return within his time. *Plowd.* 36. *b.* 3 *Co.* 44. *Hob.* 273. [202.]

Suffered to go from *Ludgate* to *Southwark*.

The caſe was, *A.* recovered upon a plaint in *London* againſt *B.* and had him in execution in *Ludgate*. *A.* died inteſtate. *B.* was permitted by the keeper of *Ludgate* to go at large into *Southwark* with *J. S.* ſervant of the keeper, and by the command of the keeper. The adminiſtrator of *A.* brought debt againſt the ſheriff of *London* upon the eſcape. *Per cur'*: It was an eſcape. He that waited upon him into *Surry* could not be officer to the ſheriff of *London*, and ſo he had no keeper; for the power of a ſheriff does not extend beyond his own county, unleſs in ſpecial caſes. And the party might have action of *falſe imprisonment* againſt him, though the *baſton* or ſervant waited on him there, being voluntary. *Dyer* 166. *accord.*

Permitting him to go abroad for pleaſure.

If the ſheriff removes his priſoner out of the county without being commanded, it is an eſcape; and if he removes the priſoner for eaſe and delight in the

ſame county, it is an eſcape: as a priſoner went to a bear-baiting with his gaoler in the ſame county; and it was adjudged an eſcape. So if the ſheriff permit his priſoner to go to work, it is an eſcape. *Hetly* 34.

To walk in town without an *Hab' corp'*.

To ſuffer a priſoner to walk in the town, though with a keeper, is an eſcape, unleſs it be upon a *Habeas corpus* from a court of juſtice. *Hob.* 202. If the *Habeas corpus* bears *teſte* in the end of one term returnable in another, this writ will not warrant the priſoner to go at large in the vacation, *Hob. ibid.*

May remove his gaol.

for though the ſheriff may remove his gaol from one place to another within his bailiwick, yet he muſt keep it and his priſoners within it, and not ſuffer them to go at large out of the priſon, though he himſelf be attending on them, without an *Habeas corpus* from ſome court of juſtice. And let keepers of priſons beware,

Caution upon an *Hab' corp'*.

when they receive an *Habeas corpus* from the *Chancery*, or any other court bearing *teſte* in the end of a term, to have the body of one in execution in the court the next term, that they do not, by colour of ſuch writs, ſuffer the party to go at large all the mean time, (as it is ſometimes practiſed); for the writ warrants no more than that he be brought out of priſon only for that purpoſe, and only for ſo much time as in judgment of law ſhall be convenient and neceſſary for the execution of the writ, and no more; which *in privilegiis odioſis* muſt ever be ſtrict.

Hab' corp' in the aſſize time.

An *Hab' corp'* out of that court to which the party is a priſoner, doth juſtify the gaoler in aſſize time, but otherwiſe if it be out of any other court but out of which ſoever, if the authority of the writ be executed, either in time or place, at the pleaſure of the gaoler or priſoner, it is an eſcape, as being carried a month before the time, and ſtaying a month after; alſo the *Habeas corpus*, being at a place at a day certain, it is no pretence of ſtay at any other places or *ultra*, to ſearch writings, or to ſpeak with witneſſes, and *immediate* is a convenient time without wilful delay. So though the ſheriff be not bound to bring the priſoner the direct way, yet he ought not to carry him round about a great way, for

No pretence of delay.

No round-about way.

acco

accommodation of the party; if he do, it is an eſcape. 3 *Keb. Rep.* 306. *pl.* 47. *Mod. Rep.* 116.

But upon this point of the priſoner's being ſuffered to go at large, there is a diverſity to be well heeded, and that is, Diverſity.

Between one in execution within the franchiſe or county where the common gaol is, where the office of ſheriff or bailiff extends; for there if the ſheriff, *&c.* aſſent that one in execution ſhall go out for a time, although he return by the time, or if he ſuffer him to get at large by bail or *baſton*, it is an eſcape. But when the ſheriff, *&c.* is commanded by writ to have the body at *Weſtminſter*, he may be a keeper of him in another county; as *Mo.* 257. *pl.* 404. 3 *Co.* 44. See *Dyer* 275. Upon the ſheriff's ſuffering one to go at large for a time, by the conſent and agreement of the plaintiff, and the priſoner returneth again. Of one in execution within the franchiſe, or county. When to have him at *Weſtminſter*. By conſent of the plaintiff.

The plaintiff was taken in execution by the ſheriff of *B.* and by an *Habeas corpus* he was brought to *Smithfield* by the gaoler of *B.* and there at eight o'clock at night the priſoner went into *Southwark*, and none with him, and there continued all night, and the next morning he returned to *Smithfield* to his keeper, and there continued with him till the return of the writ, at which day he brought him to the Lord Chief Juſtice's chambers at *Serjeants inn*, and he returned his writ, and the Chief Juſtice committed him to the *Marſhalſea*, and it was adjudged to be no eſcape in the ſheriff. So *Mo.* 299. 3 *Rep.* 43. *a.* *Mo.* 257. Upon *Hab' corp' ad recipiend'*, priſoner went from *Smithfield* to *Southwark*.

For the effect of the writ is performed to have him there at the day, and the writ does not command him to bring him the uſual way, but to have his body at the day; and ſo if one be ſheriff of two counties, and had arreſted two by two ſeveral *Capias's* in two counties, he may bring one into the other county to have them both at *Weſtminſter*, and may bring them the ſureſt way. Where the effect of the writ is performed.

If a gaoler, on an *Habeas corpus ad teſtificandum*, bring one whom he had in execution to be a witneſs, by *Twiſden*, it is an eſcape, and ſo has been adjudged. *Hab' corp' ad teſtificand'*.

judged. In *Roll* his time, the court was moved for an *Habeas corpus* for a priſoner in the *King's Bench*, that he might be a witneſs in a cauſe in *Derbyſhire* at the aſſizes, but it was denied; but he ſaid he knew it granted for one to be a witneſs at a trial at *Guildhall*, but at the charges and peril of the party, for whom he was to be a witneſs if he eſcape. The court granted an *Habeas corpus* for a priſoner in the *Marſhalſea* to teſtify in a cauſe in *Middleſex*. But *Hale* Chief Juſtice ſaid, he would never grant it in his chamber, being but a private perſon, and the party may eſcape, which would be remedileſs. *Sid.* 13.

Denied into the country.

Allowed to *Guildhall*.

Allowed into *Middleſex*.

The King cannot licenſe one to go at large.

If one be in execution in the *Fleet*, or other place at the ſuit of the King, or of a common perſon, and the warden or gaoler (by the command of the Lord Chancellor or Treaſurer) ſuffer him to go into the country with a keeper to gather money, the ſooner to pay the King, and he goes accordingly, and returns to priſon again; yet this is an eſcape as to the common perſon, for the King himſelf cannot licenſe a man to go at large. *Dy.* 297.

At the ſuit of the King in the *Fleet*.

If one be in execution at the ſuit of the King in the *Fleet*, the warden may ſuffer him to go to his counſel with his keeper. But not ſo in the caſe of a common perſon. *Sav. Rep.* 29.

Woman warden marries priſoner.

A man is in execution for debt, and a woman being warden of the *Fleet*, marries the priſoner; this is an eſcape, for that he cannot be his own priſoner, nor a priſoner to his wife. *Hetl.* 36. *pl. Rep.* 37. *a.*

Simile of ſheriff.

So if the ſheriff or gaoler marry a woman that is in execution for debt.

Suffering one to ſee a play.

Sheriff ſuffered one in execution, and in his cuſtody, to go and ſee a play; and the ſame was adjudged an eſcape, and the party could not be in execution again. *Leon.* 237. *pl.* 321.

Hab' corp' in regard of the plague.

This caſe was referred by the King to the judges, *Trin* 12 *Car.* 1. whether in regard of the plague *Habeas corpora* may be granted for the priſoners in execution, in the priſons of the *King's Bench* and *Fleet*, upon judgment in the *Common Bench* and *Exchequer*?

chequer? And it was certified by them to the Lord Keeper, that if upon *Habeas corpus* granted, the gaoler ſuffers the priſoner to go at large with keeper or baſton, that this is an eſcape, and that no *Habeas corpus* ought to be by the law for this purpoſe, which the King well approved of. *Hut.* 129. *Cro. Car.* 466.

Not allowed.

And *in primo Caroli* the priſoners in the *Fleet* petitioned the parliament, that they may have *Habeas corpora* in the vacation, in the reſpect of the great plague in *London*; but the parliament would not aſſent to it, becauſe againſt the law. *Cro. Car.* 14.

A *Capias ad ſatisfaciend'* is ſerved upon one who is a priſoner for felony, and indicted and arraigned, and found guilty, and afterwards eſcapes. Debt lies againſt the ſheriff, for the execution was well ſerved upon him; and though his body was at the Queen's pleaſure, yet he ſhall not take advantage of his own *tort*, but he ſhall anſwer the ſuit or execution of a common perſon. *Mo.* 274. *pl.* 428. 2 *Leon.* 88. *pl.* 112. *Cro. El.* 164. *pl.* 1. 165, 576. *Sav.* 63. *pl.* 135.

Execution ſerved upon one who is priſoner for felony, and then an eſcape.

The ſheriff had one in cuſtody on a *Ca. ſa.* which iſſued *poſt diem & annum*, without a *Scire fa'* to warrant it, and let him eſcape; and 'twas held the ſheriff was liable, notwithſtanding the proceſs was erroneous, and that he ſhould not take advantage of the error. But otherwiſe had it been on a *Capias ad reſpondend'*, teſted in *Trinity* term, and returnable in *Hilary*, becauſe ſuch proceſs muſt be returnable from term to term. *Salk.* 273. *pl.* 4. 2 *R. Raym.* 775.

Sheriff liable for eſcapes on erroneous proceſs.

Debt for 200*l.* on bond conditioned to pay 100*l.* and for want of bail the defendant was committed to the marſhal, and he applied to the juſtices of peace of *Surry*, and procured a diſcharge on the act for relief of inſolvent debtors. The plaintiff obtained an eſcape warrant, upon which he was taken; and on a motion to be diſcharged, the court held this was an eſcape; for he being a priſoner indebted, and alſo charged in above 100*l.* debt and damages, the juſtices had no authority for what they did, and there

Diſcharge by a court, not having juriſdiction, is void, and an eſcape.

their diſcharge was illegal and void. *Salk.* 273. *pl.* 5.

Delivery upon a void *Audita querela* is no eſcape.

The ſheriff delivers the priſoner upon a void *Audita querela*. This is no eſcape, and there the priſoner may be taken again in execution. *Mo.* 344. *pl.* 479.

But if a *Scire facias* had in it the words of *Audita querela*, it is againſt law, and it is an eſcape, if the ſheriff deliver the priſoner upon it. *Rol. Rep.* 383.

Marſhal delivers one on a forged warrant.

A forged warrant of attorney for ſatisfaction is delivered into the office, where one is in execution, and the marſhal lets him go. It is an eſcape, unleſs the attorney's hand were to it, or a *Superſedeas* delivered. *Keb. Rep.* 873. *pl.* 24.

The marſhal is bound to take notice of all commitments in courts. See 6 *Mod.* 33. But in other caſes he is not chargeable in eſcape till notice of the commitment. *Salk.* 272, *&c.*

Debt lies upon eſcape of the wife.

If a man recover againſt *Baron and Feme*, and take both in execution, and after the wife is ſuffered to eſcape, though the huſband continue in priſon, yet debt lies in this eſcape againſt the ſheriff, in which all the debt ſhall be recovered; for this was the debt of the wife, and ſhe is as fully in execution as the huſband. And debt lies on it as well as action on the caſe. So if the *Feme* be only taken in execution. 2 *Bulſtr.* 320. *Rol. Abr.* 810. 3 *Bulſtr.* 150. *Rol. Rep.* 204, 205. *pl.* 6. *Cro. Jac.* 657. *pl.* 8.

In reſpect of the entry on the roll of *Committitur*.

A *Committitur* upon the roll is evidence of the perſon's being in priſon, ſo as to charge the marſhal with on eſcape, though ſuch *Committitur* be not entered in the marſhal's book. Adjudged. *R. Raym.* 704, 705.

Ca' ſa' delivered, and party taken after on a *Cap' utlagat'*.

Capias ad ſatisfaciend' was delivered to the ſheriff, *ver. J. S.* and after the ſheriff did arreſt *J. S.* by force of a *Capias utlagat'*, and then the party in the *Capias* came to the ſheriff, and prayed that the party may remain in execution for his debt alſo. And the ſheriff ſuffers him to go at large, and upon both writs returned *Non eſt inventus*. *Per cur'*: The ſheriff was not bound in point of eſcape to detain the

Difference of notifying executions.

the priſoner for the debt of the plaintiff in eſcape; and it is not like where one is in the *Fleet* for execution; there, if other condemnations in other courts be notified to the warden of the *Fleet*, he ſhall be chargeable with them all. *Leon.* 253.

Upon eſcape of the bail.

Scire facias lies not on the eſcape of a bail, if no *Scire fac'* iſſued out againſt him; for the ſureties ought not to be taken in execution preſently. The condition of recognizance of ſureties is, that they bring in the defendant if he be condemned, or to pay the debt. Now if no *Scire fac'* iſſues out againſt him, the ſurety being taken cannot plead the releaſe of the plaintiff, or the death of the defendant, in his diſcharge, as he might do upon *Scire facias.* 2 *Leon.* 29. *pl.* 33. *Cro. Eliz.* 185. *pl.* 7.

Eſcape in law upon not delivering over one in execution.

The ſheriffs of *London* by indenture delivered over *J. S.* (in execution at the ſuit of *A.* and *B.* ſeverally) and only mention the execution of *A. J. S.* eſcapes; *B.* brought debt againſt the ancient ſheriffs on this eſcape. It well lies; for he cannot be in cuſtody of the new ſheriffs for this execution, becauſe they were not charged with this execution, and the fault was in the old ſheriffs that they omitted this execution of the plaintiff in their indenture; and the eſcape began *eo inſtante* that the ancient ſheriff delivered the priſoner to the new, for then they ceaſe to have the cuſtody of him, and although he remain in the rules of the priſon, it is an eſcape in law. 3 *Co.* 72.

Upon one returned *Languidus*, and afterwards delivered over.

The old ſheriff arreſted one upon a *Latitat*, and at the day returned *Languidus*, *&c.* and afterwards *in exitu ab officio ſuo* delivered him to the new ſheriff, as a priſoner for this cauſe, and the new ſheriff ſuffered him to go at large. This is an eſcape in the new ſheriff, and an action of the caſe lies againſt him; and though the other ſheriff returned *Languidus*, *&c.* yet this is not material to the plaintiff, he remains always in priſon. *Cro. Jac.* 380. *pl.* 8. See *Sid.* 5.

New ſheriff not chargeable before delivery.

If the ſheriff takes a man in execution, and after a new ſheriff is made; and before the other ſheriff delivers over, the party who was in execution

eſcapes: The new ſheriff is not chargeable for this eſcape, but the old ſheriff; for the new ſheriff is not chargeable with any priſoner before delivery to him. 2 *Rol. Abr.* 557.

One let go, and came again into gaol.

One in execution is willingly let go out of priſon by the gaoler, and then came into the gaol again; then a new ſheriff is, and then he makes eſcape.

If the old ſheriff keep any priſoner after he is diſcharged of his office, it is an eſcape. 2 *Leon.* 54. *pl.* 76.

The like.

If one taken upon a *Cap'* eſcape, and the ſheriff die, and a new ſheriff be made for the remainder of the year; then the ſame perſon is taken by another *Cap'* for the ſame cauſe and eſcape: this will not charge the new ſheriff. *Hob.* 202.

Returns and eſcapes.

If the priſoner walks abroad, and returns in the time of one ſheriff, and eſcapes in the time of another ſheriff; this is no eſcape in the time of the ſecond ſheriff. *Hob.* 232.

New ſheriff ſhall be charged in eſcape upon a new execution.

A. was taken in execution in the time of the old ſheriff, and then eſcaped; afterwards in the time of the new ſheriff the plaintiff again ſued a *Scire facias* againſt *A.* upon the ſaid judgment: upon which execution was awarded by default, and thereupon iſſued a *Cap. ad ſat.* againſt *A.* by which he was taken and eſcaped. *Per Cur':* The new ſheriff ſhall be charged; for though *A.* was in execution, which was determined by eſcape in the time of the old ſheriff, yet when a new execution was awarded againſt him upon his default in the *Scire fac'*, the ſame ſhall bind the ſheriff, out of whoſe cuſtody he eſcaped. *Leon.* 3. *pl.* 5.

The priſoner committed is in cuſtody of the ſheriff and the gaoler; and if he be committed to the ſheriff, and the gaoler ſuffer him to eſcape, the ſheriff is puniſhable. For the ſheriff ſhall anſwer civilly for the faults of the gaoler, but not criminally. *Salk.* 272. 5 *Mod.* 414. *R. Raym.* 424.

A precedent aſſent of the ſheriff will excuſe an eſcape, but not a ſubſequent. *Salk.* 271.

If

If the ſheriff arreſt a man upon a *Latitat* or other mean proceſs, and the priſoner is reſcued from him before he be carried to priſon, and the ſheriff returns the reſcous againſt the reſcuers; this ſhall excuſe the ſheriff in *Action ſur caſe* upon eſcape, becauſe he is not bound, neither is it convenient for him to bring a *Poſſe comitat'* with him to ſerve every mean proceſs. But if the ſheriff bring him to the gaol, and after he is reſcued out of priſon, and he returns the reſcous, yet this ſhall not excuſe the ſheriff, for he ought to keep his gaol at his peril. But if the ſheriff takes a man in execution, as on a *Capias ad ſatisfaciend'*, and he is reſcued before he brings him to priſon, though he returns the reſcous, yet this ſhall not excuſe him, for that he is to take a *Poſſe comitat.* and the party cannot have a new execution. 3 *Bulſtr.* 198, 199.

On return of reſcous on mean proceſs, the ſheriff ſhall be excuſed in action of eſcape.

Debt was brought by the plaintiff, executor of *A.* againſt the defendant, as executor of *B.* formerly ſheriff of the county of *D.* Upon *Nil debet*, the jury found a ſpecial verdict, *viz.* that *A.* recovered a judgment againſt *F.* and ſued a *Capias ad ſatisfaciendum* directed to *B.* then ſheriff, *&c.* which writ of *Capias ad ſatisfaciendum* was executed by the under-ſheriff; and *F.* being in cuſtody, aſſigned a term for years to the under-ſheriff in ſatisfaction of the money recovered by the judgment, and to be diſcharged out of execution; and this aſſignment was to be void upon payment of the money recovered by the judgment at a day, after the office of *B.* to be ſheriff ſhould determine; and upon this *F.* was diſcharged out of execution, and at the day, *&c.* he paid the money to the under-ſheriff; but the under-ſheriff did not pay the ſaid money to *A. B.* and *A.* died, and the plaintiff as executor to *A.* brought this action againſt the defendant. And it was adjudged, that it did not lie; becauſe the releaſe of *F.* out of cuſtody was an eſcape in the ſheriff, and the receipt of the money afterwards could not purge it. Ld. *Raym.* 399.

Eſcape not purged by receiving money of defendant afterwards.

It was adjudged that if the juſtices at the quarter-ſeſſions make an order by virtue of * 2 *W. & M.* * Expired.

Poor priſoners.

c. 15. for the diſcharge of poor priſoners, which order is not warranted by the ſtatute (as if the priſoner was in execution for more than 100*l.*) and the ſheriff diſcharge the priſoner accordingly, he ſhall not be liable to an eſcape.

Qu. Becauſe in that caſe the juſtices had no juriſdiction, and the ſheriff is bound to take notice at his peril for what ſum his priſoner was charged in execution? Ld. *Raym.* 3.

How far the court will ſtay proceedings in an action of eſcape.

An action of eſcape having been brought againſt the marſhal for diſcharging a poor perſon out of cuſtody, though in obedience to a rule of this court of *King's Bench*. Motion that all proceedings in this action might be ſtaid. It was ſaid the ſtatute had expreſly provided, that no gaoler ſhould be anſwerable for the eſcape of ſuch perſon ſo diſcharged, which it was hoped was a ſufficient foundation for this motion. Accordingly the court made a rule to ſhew cauſe. *Barnard. K B.* 439.

Chargeable tho' proceſs be erroneous.

Though the proceſs of the court be erroneous, yet the ſheriff ſhall be chargeable on eſcapes; as if firſt *Capias* be by a wrong name, and the *Teſtat.* by a right name; ſo if one who is in execution by a *Capias ad ſatisfaciend'*. On a recognizance, though the *Capias* is erroneouſly awarded, yet the ſheriff is chargeable. 2 *Leon.* 84. *pl.* 112. 2 *Bulſtr.* 256. *Cro. Eliz.* 188. *pl.* 14. 576.

Diverſity if he can alledge nullity in the record.

So that he is not to take advantage of error in the proceedings; otherwiſe it is where he can alledge a nullity in the record; and if the court award a *Capias* where it lies not to the ſheriff, by force of which he takes the party, and then ſuffers him to eſcape, he ſhall be charged, for he is not to diſpute the authority of the court.

Diverſity where the court has juriſdiction of the cauſe, and where not.

Another difference is where the court hath juriſdiction of the cauſe, and where not: where the court hath juriſdiction, and doth miſaward proceſs, this is but error; but if the court hath no juriſdiction, and doth miſaward proceſs, there all is void, and the ſheriff may ſhew this in diſcharge of himſelf: as if a *Formedon* be commenced originally in *B. R.* or an appeal in the *Common Beneh*, all is void, and no

no action of eſcape lies againſt the ſheriff; as *Kingſton* upon *Hull* is a limited juriſdiction, and they hold plea of a bond made out of their juriſdiction, and thereupon a *Capias* was awarded againſt the obligor, who being arreſted on it, eſcapes; no action lies againſt the ſheriff; and this is the difference in the caſe of the *Marſhalſea*. See *Cro. Jac.* 3. *Yelv.* 42. 2 *Bulſtr.* 63. *Brownl.* 83. *Mo.* 274. 8 *Co.* 243.

Juriſdiction to be alledged.

Action on the caſe is brought in *B. R.* againſt the officer in an inferior court upon eſcape; if the plaintiff declares that he brought an action againſt *J. S.* in the ſaid inferior court (as *Kingſton upon Hull*) on an obligation made at *Halifax* in *Com' Ebor'*, and does not alledge this to be within the juriſdiction of the ſaid inferior court, and upon this judgment was given and execution granted, and the defendant took him in execution and ſuffered him to eſcape, and upon this he brings his action.

Declaration, tho' the action be tranſient; yet if brought in inferior court, the cauſe of action muſt be alledged to ariſe there.

This declaration is not ſufficient to charge the defendant, becauſe it is not alledged, the obligation was made within the juriſdiction of the court, for although the action be tranſitory, yet this inferior court had a limited juriſdiction of things ariſing within the juriſdiction; and the proceedings there were *coram non judice*, and utterly void, of which the officer ſhall take advantage in this action for the eſcape. *Mar.* 8. *pl.* 20. 10 *Vin. Abr.* 95. *pl.* 3. See *Lutw.* 1567. 2 *Mod.* 197. 3 *Lev.* 23.

Erroneous proceſs, becauſe the warrant varies from the command to the ſheriff of *Com. Pal. Lancaſter.*

In caſe upon eſcape againſt the ſheriff of *Lancaſter*, for ſuffering one *M. W.* to eſcape out of execution; and ſhews a recovery againſt him in *B. R.* and *Cap. ad ſatisfaciend'*, and a *Non eſt invent.* returned; and a *Teſtatum* that he concealed himſelf in the county of *Lancaſter*, and a writ was awarded to the chancellor of the county palatine of *Lancaſter*, that he ſhould command the ſheriff to take the ſaid *J. M. ad ſatisfaciend'*, &c. *Ita quod* the ſaid chancellor ſhould have him, &c. and that the chancellor commanded the ſheriff that he would take the ſaid *M. ita quod* the ſheriff ſhould have him *coram juſticiariis*, &c. and the defendant being ſheriff did thereupon arreſt him, &c. Error was brought, becauſe the writ

writ directed by the chancellor to the ſheriff was not warranted by the writ directed to him, for it varies from the command; for it ought to have been that the ſheriff ſhould have the body before the chancellor, *ita quod* that he ſhould have him before the juſtices. *Sed non allocat'*; for though there be error in the proceſs, the ſheriff ſhall not take any advantage thereof, but having ſuffered him to eſcape he is reſponſible to the party. *Cro. Jac.* 288. *pl.* 5.

Sheriff ſhall not take advantage.

So the ſheriff ſhall not take advantage of error in the proceſs, as in *B. R.* the plaintiff had judgment to recover more than was due to him. 2 *Saund.* 100.

By a gaoler.

Debt was brought againſt a gaoler for eſcape, who ſaid, the ſheriff did not deliver him lawfully to him; but *per Cur'*, he is not to meddle whether the ſheriff delivered him lawfully to him.

Proceſs diſcontinued, no plea.

Action againſt a gaoler for ſuffering one condemned to go at large; it is no plea to ſay, that the proceſs was diſcontinued before the judgment given, for he was a ſtranger to it. 4 *Co.* 84.

Priſon broken by the King's enemies ſhall excuſe the ſheriff, &c.

If the priſon be broken by the King's enemies, this ſhall excuſe the ſheriff from eſcape, for the gaoler could not reſiſt them, and he can have no remedy over. *Cro. Eliz.* 815. *pl.* 4. *Ventr.* 239. But if a priſon be broken by rebels and traitors within the realm, ſo as the priſoners eſcape, this ſhall not excuſe the eſcape, for the gaoler may have his remedy over. 2 *Mod.* 28. *R. Raym.* 651.

Eſcape by ſudden fire ſhall excuſe the ſheriff.

If the priſoners eſcape by ſudden fire, this ſhall excuſe the ſheriff, for it is the act of God. 10 *Vin. Abr.* 86. *pl.* 6.

Two bound, one in execution and ſuffered to eſcape.

Two are bound jointly and ſeverally, and one is in execution, and the gaoler ſuffers him to eſcape voluntarily, this cannot be pleaded by the other, for it is no diſcharge of the debt, and by conſequence the action lies againſt the other; now where two are bound jointly and ſeverally, one was condemned and taken in execution, and after the other was ſued condemned and taken, the firſt eſcapes, the other ſhall not have *Audita querela*, becauſe it muſt be an execution with ſatisfaction: and though the plaintiff

Execution with ſatisfaction.

may

may have debt on eſcape againſt the ſheriff, yet there ought to be ſatisfaction in fact before *Audita querela* lies, and perhaps the ſheriff is worth nothing. And if the defendants were ſued by one writ and ſeveral *Præcipes*, although the entry ſhould be *Quod unica ſat executio*, this is intended to be with ſatisfaction, for he ſhall have both their bodies. But if two are taken in execution for debt, and one eſcapes, debt lies againſt the ſheriff; and after the debt recovered againſt the ſheriff, or againſt the other, the other which remains in execution ſhall have *Audita querela* to be relieved, but the body taken in execution is no ſatisfaction for the debt. *Danv. Abr.* 635. *pl.* 11. *Rol. Abr.* 903. *pl.* 22. *Mo.* 459. *pl.* 5 *Co.* 86. *Cro. Eliz.* 4, 7, 8. *Cro. Jac.* 351. *pl.* 555. *pl.* 573. *pl.* 2 *Bulſt.* 321.

Two taken, one eſcapes after recovery againſt the ſheriff, the other ſhall have *Audita querela*.

The eſcape of one joint or ſeveral obligor, where both be in execution, ſhall not diſcharge the other. *Hob.* 2, 59, 560.

And therefore the eſcape of one in execution, where two are bound in a bond, is no plea to the bond; and though he eſcaped by the voluntary permiſſion of the ſheriff, ſo as the plaintiff is intitled to an action againſt the ſheriff, yet that ſhall not deprive him of his remedy againſt the other obligor: but if he had pleaded, that the ſheriff ſuffered him to go at large by the licence of the plaintiff, it might have been pleaded in diſcharge. *Cro. Car.* 75. *pl.* 4.

Eſcape of one in execution no plea to the bond, tho' it was by permiſſion.

G. and *A.* were jointly bound to *J.* in a bond of 7000*l.* the obligee takes ſeveral actions, and had two ſeveral judgments, and ſued both to outlawry, and *A.* was taken upon a *Cap' utlagat'* by the ſheriff of *D.* who voluntarily ſuffered him to eſcape. *J.* brought debt againſt the ſheriff, and recovered and received ſatisfaction, and proceeded to take *A.* but *A.* brought *Audita querela*: and he failed in his declaration, becauſe the ſatisfaction made by the plaintiff to the ſheriff was not ſpecially pleaded, (*viz.*) time and place where it was made; for it is iſſuable, and it may be made after the *Audita querela* purchaſed. But if *J.* had recovered only damages in action of caſe for the eſcape, the plaintiff ſhould have had

The ſatisfaction ought to be ſpecially ſhewn in *Audita querela*.

Difference between action of *Debt* and *Caſe*.

had no *Audita querela*; but here he recovered his original debt in action of debt, grounded upon the eſcape. *Mod. Rep.* 170.

Any one on joint execution eſcapes, debt lies for the whole.

Upon the eſcape of any one upon a joint judgment and execution, the debt lieth for the whole; eſpecially if they be in ſeveral priſons. Though the duty wholly ſurvived by the death of the party eſcaped before any action brought, and though the executor of the party dead is diſcharged.

Death of one.

But *quære* if the death of one before the action brought, doth diſcharge the eſcape: by *Hale* and *Rainsford* it doth not: by *Wild* and *Twiſden* it doth. 3 *Keb. Rep.* 305. *pl.* 47.

Where to be brought.

If a ſuit be in the admiralty for a matter ariſing *ſuper altum mare*, and upon this the defendant is in execution and eſcapes, the plaintiff may have an action for this eſcape in *B. R.*

Caſe lies at Common law.

Action on the caſe for eſcape lies at Common law, but no action of debt lay at Common law; but the party was driven to his ſpecial action on the caſe, which action was grounded on a *Treſpaſs* or *Tort*, and not upon any contract in deed or law. *Rol. Abr.* 536.

Debt lies by ſtatute law.

But now action of debt lies againſt the ſheriff or gaoler for an eſcape upon the ſtatute of *W.* 2. *c.* 11. and 1 *R.* 2. *c.* 12. gave debt againſt the warden of the *Fleet*; and ſo it is in equity againſt the marſhal: and though the ſtatute limits the action to be brought by writ of *Debt*, which is by original; yet a bill of debt lies by the equity of theſe ſtatutes. And foraſmuch as this ſtatute gives remedy by debt, it gives damages alſo. 2 *Stra.* 873. *Barnard. K. B.* 354. And this act doth extend to *Feme Coverts*, and keepers of gaols for eſcape of priſoners in execution. *Leon.* 17. *Cro. Jac.* 658.

A. levies a plaint in the ſheriff's court of *London* againſt *B.* who was in cuſtody on a former plaint by *C.* and then *B.* eſcapes (*i. e.* out of the ſheriff's counter.) *A.* may have an action of eſcape againſt the ſheriffs of *London*. *Salk.* 273.

Caſe lies not on eſcape on mean proceſs.

Action on the caſe lies not for eſcape on arreſt in mean proceſs; but upon execution it doth. *Rol. Rep.*

Rep. 440. *pl.* 5. 3 *Bulſtr.* 198. *Cro. Jac.* 419. *pl.* 10. *Mo.* 852. *pl.* 1162. *Rol. Rep.* 388. *pl.* 9.

But if a man be arreſted on mean proceſs at the ſuit of *J. S.* and he eſcape, *J. S.* ſhall have a ſpecial action againſt the ſheriff on this eſcape. *Rol. Abr.* 99. 10 *Vin. Abr.* 85. *pl.* 1, 2. Special action.

If a man ſue a *Latitat*, to the intent to declare againſt the defendant after arreſt *in Cuſtod' mareſc'*, in action of debt, and the ſheriff arreſts him, and ſuffers him to eſcape, an action lies againſt the ſheriff ſhewing this ſpecial matter, and he ſhall recover his damages, having regard to the loſs of his debt. *Rol. Abr.* 537. *Latitat* in debt.

One brought an action againſt *J. S.* before the mayor, bailiffs, and ſtewards of *N.* where the bailiffs are the gaolers of the town priſon, and *J. S.* is committed to the bailiffs on mean proceſs for want of bail, and they let him at large before judgment and execution, and after the plaintiff recovers againſt him. The plaintiff may have a ſpecial action againſt the bailiffs for the eſcape; for by it he is deprived of the ſpeedy means to have him in execution after the judgment. *Rol. Abr.* 99. Eſcape on mean proceſs of one in priſon for want of bail, lies againſt bailiff of a franchiſe.

If the ſheriff ſuffers one taken by him in execution to eſcape, the party at whoſe ſuit he was taken in execution may have an *Alias capias* againſt the party that eſcaped, to take him again in execution, or an action on the caſe againſt the ſheriff. *Lil. Abr.* 725. *Alias capias*; or caſe.

If the ſheriff takes one by *Capias ad ſatisfaciend'* in debt, if he after permits him to go at large, and returns not the writ, yet debt lies on this eſcape; for there is a record of which the party ſhall take advantage, though the writ be not returned. *Cro. Eliz.* 17. *pl.* 8. Action lies tho' the writ be not returned.

Action on the caſe, upon eſcape of one brought in execution by force of a *Cap' utlagat'*, is *tam pro dom' rege quam pro ſeipſo*; and the party ſhall have all in damages. *Fitzgib.* 265. 2 *Stra.* 901. Eſcape on *Cap' utlag'*.

An action on the caſe, *Tam pro dom' rege quam pro ſeipſo*, was brought, for that he had a *Capias utlagat'* after judgment againſt *J. S.* and delivered it to By *Qui tam.*

to the ſheriff of *D.* to execute it, who ſeeing *J. S.* and being deſired to execute it, would not do it, but ſuffered him to go at large, and afterwards the ſaid ſheriff returned *Non eſt inventus*. *Per Cur'*: The action is well brought, and the King is to have the benefit thereof as well as the party. And in his declaration he need not cite the whole record, but begin at the judgment *quod cum recuperaſſet, &c.* for it is but a conveyance to the action, and it is not neceſſary to ſhew the whole record; and it ſufficeth to begin at that which is the cauſe of action. *Cro. Jac.* 532. *Cro. Eliz.* 877. *Cro. Jac.* 360.

Declaration *quod cum recuperaſſet, &c.*

And this is to be conſidered in the caſe of a *Capias utlagat'*, or a *Capias pro fine*; or where one ſhall be ſaid to be in execution without prayer of the party, and where not.

Eſcape on *Cap' utlagat'*.

If a *Cap' ad ſatisfac.* iſſue upon a judgment in action of debt, and the ſheriff return *Non eſt inventus*, and thereupon he is outlawed; and afterwards a *Cap' utlagat'* iſſues out againſt him, upon which he is taken and impriſoned, and after is permitted to go at large; the party who recovered ſhall have action of *Debt* upon this eſcape againſt the ſheriff; for he was in execution againſt him alſo, becauſe he cannot have a new *Capias ad ſatisfaciend'*. And if he eſcape, although he was taken at the King's ſuit, yet the party had ſuch intereſt in the body, that he ſhall have action of *Eſcape* againſt the ſheriff; and before the plaintiff's prayer to have him in execution, he is in execution at his election. So that if the ſheriff ſuffer him to go at large before the plaintiff hath determined his election, it is an eſcape againſt the plaintiff, if he will, and an action of debt lies. *Yelv.* 20. *Rol. Abr.* 810.

Yet the party may have debt.

Where one taken on *Capias* ſhall be in execution at the ſuit of the party, without prayer.

Recovery in *B. C.*

Error in *B. R.* *Cap' utlag'*.

Eſcape.

A. recovers in debt *v. D. in Banco Communi*, and ſues a *Capias ad ſatisfac.* and an *Ex poſt cap'*, and outlaws the defendant who brought error in *B. R.* and judgment affirmed, and within the year a *Cap' utlagat'* is awarded, and the defendant taken, and the ſheriff ſuffers him to eſcape before the return of the writ; action lies againſt the ſheriff. The defendant here being taken by *Cap' utlagat'* out of the

King's

King's Bench, shall be in execution for the plaintiff presently after the arrest, if he will, although he was never brought into court, nor the court committed him in execution for the party. 5 *Co.* 88. *Cro. Eliz.* 706. *pl.* 28. See *Sid.* 380. *Yelv.* 20. 3 *Mod.* 201. 10 *Vin. Abr.*

On *Cap' pro fine* he shall be in execution at the suit of the party.

In all cases when the plaintiff may have a *Capias ad satisfaciend'*, and the defendant is taken by *Capias pro fine*, he shall be in execution for the plaintiff, if he will, without prayer: as a *Capias pro fine* on recovery in *Assumpsit*, and also a *Cap' ad satisfac'* returnable the same term at one and the same return; and as to the *Capias pro fine* the sheriff returns *Cepi corpus*; and as to the *Cap' ad satisfaciend'*, *Non est inventus*. If the sheriff in such cases takes the party by *Capias pro fine*, now upon this taking he is in execution for the party; and if the sheriff let him go at large, he shall answer for the escape. *Leon.* 51. *pl.* 65.

Cap' pro fine denying his deed.

So if a man be taken by a *Cap' pro fine* for denying his deed in the action of *Debt*, and is suffered to go at large, he who recovers shall have debt against the sheriff; for the *Cap'* is *ad respondend' tam nobis quam partì.* 7 *H.* 4. 4.

Recovery on forger of false deeds.

So in recovery on forger of false deeds, if the defendant be imprisoned for the fine at the prayer of the King's attorney, if he be suffered to go at large before satisfaction to the plaintiff, he may charge him for the escape, because he is in execution to the party upon the prisal at his election. For he ought to be in execution at the suit of the party, before suit to the King, because the suit of the party is the original; and the time but accessary, because of the suit. 7 *H.* 6. 6. *b.*

Where no *Capias* lies in the original, he shall not be in execution before prayer of the party.

But if a man be taken by *Capias pro fine* for the King, where no *Capias* lies in the original, (as in *Mayhem* with force, *&c.*) and suffered to escape before prayer of the party to be in execution for his damages, the party shall not have escape against the sheriff, because he would not be in execution for him before prayer.

Pleadings, *Non permiſit.*

Freſh purſuit.

As for the pleading to *Eſcapes* directly, the defendant either denies the *Eſcape*, and then he pleads *Non permiſit ire ad largum*, or elſe he confeſſeth the *Eſcape*; but pleads that he made *freſh purſuit*, or that he eſcaped by licence of the plaintiff.

The late Mr. Juſtice *Deniſon*'s opinion on the following caſe ſeems a very proper introduction to the pleadings to actions of eſcape: the caſe was that,

A. recovered judgment againſt *B.* in an action of debt on bond, and the defendant was committed to the *Fleet*, and charged in execution at the plaintiff's ſuit, and obtained of the warden the liberty of the rules, ſince which the defendant had taken an houſe in the liberty of the rules, and gone out whenever he pleaſed, as if he was no priſoner, but always returned again to his houſe; ſo that if the plaintiff brings an action for an eſcape, the warden will plead freſh purſuit, and recaption, always having the defendant ready; and if ſuch plea can be maintained the utmoſt of charging a defendant in execution amounts to no more, than obliging him to have a lodging in the *Old Baily* with liberty to go where he pleaſes.

Qr. Is the defendant's returning to his lodging in the rules *after* an eſcape ſufficient to maintain the warden's plea of freſh purſuit and recaption? or is it neceſſary after an eſcape for the warden to put the defendant within the walls of the gaol, or to take freſh ſecurity for the liberty of the rules, to maintain ſuch plea? for after an eſcape the penalty of the bond for the liberty of the rules is forfeited, and though the priſoner returns, he is under no reſtraint or impriſonment whatſoever unleſs he be recommitted to the gaol, or the warden takes a new ſecurity the former penalty being already forfeited.

An. I am of opinion that though the warden is indulged to keep his priſoners out of the walls of the priſon of the *Fleet*, becauſe the priſon is not large enough to contain all the priſoners, yet he ought not to ſuffer them to go out of the rules; and therefore if it can be proved that the priſoner goes at large with his privity, though he returns at night

yet that will be an eſcape for which the warden will be anſwerable; and therefore if notice be given the warden that the priſoner is ſeen at large, and after this he is after ſeen without the rules, that will be evidence of the privity of the warden to the priſoner's eſcape, and avoid the plea of freſh purſuit; as to the ſecurity taken by the warden, that does not ſeem to be material in the preſent caſe.

6th *June* 1740. *Lincoln's Inn.*

THO. DENISON.

Though priſoner be out of the view.

Though the priſoner that eſcapes be out of the view, yet if he be taken *in recenti executione*, he ſhall be in execution again; and though he fly into another county where the ſheriff had not power, yet (forasmuch as the eſcape was of his own wrong, whereof he ſhall not take advantage) the ſheriff may retake him in another county, and he ſhall be in execution. And freſh purſuit is not, that he muſt have him always in his view; but if he makes freſh purſuit, ſo that it doth not appear fully there was a default in the ſheriff in his purſuit, though he be a day and a night out of his view, yet he ſhall be ſaid to be in execution for the party againſt his will upon the retaking; as if the priſoner eſcape to an houſe, and the ſheriff ſets a watch and takes him when he comes out.

If ſheriff makes no default.

If the ſheriff retake him on freſh purſuit before action brought, he ſhall be excuſed.

If the gaoler makes a freſh purſuit before any action commenced, and he is retaken, the gaoler ſhall be excuſed; but it is otherwiſe if before the priſoner is retaken the party brings his action, for at the time of the action brought he had good cauſe of action: but it ſeems by *Winch* 53. that retaking upon freſh ſuit after action is good, but not after iſſue joined. *Cro. Jac.* 657. *pl.* 8.

Eſcape at the aſſizes in *Norfolk*.

Stone, attorney of *C. B.* was in execution in *Norfolk* for 1000 *l.* and he by practice procured himſelf to be removed by *Habeas Corpus* before *Coke* chief Juſtice, at the aſſizes in *Lent*, and then eſcaped to *London*, and in *Eaſter* term following the bailiff did retake him. The opinion of the court was,

Taken at *London* next term.

that the freſh ſuit made was good, though he took him again at the end of the year, if inquiry was made after him, and ſo by conſequence action for falſe impriſonment againſt the bailiff did not lie. *Godb.* 177. *pl.* 247.

If the ſheriff does not make freſh purſuit, yet he may retake him.

If the plaintiff bring his action before the ſheriff retake him, or if the ſheriff does not make freſh purſuit, yet in both caſes the ſheriff may retake him, and keep his body in cuſtody till he agree with him, or he may have action on the caſe for his tortious eſcape. And where the priſoner eſcapes of his own wrong, and is retaken, he ſhall never have an *Audita querela* againſt the ſheriff; but if he eſcapes with the conſent of the gaoler, he cannot retake him: and if he do, the party ſhall have an *Audita querela*. If one in execution eſcape, the ſheriff may not retake but upon freſh purſuit; but he ſhall have action on the caſe againſt him, or *Treſpaſs quare priſonam fregit*. 3 Co. 52. Poph. 41. Jo. 145. pl. 2. Cro. Jac. 657. pl. 8. 2 Rol. Rep. 282, 283.

Treſpaſs lies, tho' he may not retake him.

If the priſoner dies, yet action lies againſt the gaoler.

A priſoner eſcapes, the gaoler makes freſh purſuit, and before he hath taken him the priſoner dies; this is the act of God, and yet becauſe it was once an eſcape, the action of eſcape lies againſt the gaoler. *Poph.* 186.

In freſh purſuit, ſheriff not to break open a cheſt.

Upon eſcape, the ſheriff may not in freſh purſuit enter into the houſe of *J. D.* and break the cheſt of *J. N.* to ſearch for the priſoner. 2 *Rol. Abr.* 564.

Eſcape out of *Devon*, and is found a priſoner in *Somerſetſhire*.

If a man in execution in the county of *Devon* eſcapes into the county of *Somerſet*, where he is taken in execution at another man's ſuit, and after the ſheriff of *Devon*, on freſh purſuit, finds him in priſon in *Somerſetſhire*, it is made a queſtion, how he may charge the ſheriff of *Somerſet* with the firſt execution, or put the party in execution, ſeeing he ſhall not retake him *Rol. Abr.* 902.

Information againſt the ſheriff for eſcape.

Though information lies againſt the ſheriff for eſcape, yet it lies not on eſcape after taking by freſh purſuit, no more, though the information be depending before the taking, ſo that the officer's diligence appear. 2 *Keb. Rep.* 384. *pl.* 54.

The

The plaintiff counts of an eſcape in *London*, and the defendant juſtifies the retaking in *Devon*, ſo that the eſcape at *London* is not anſwered, it is nought upon demurrer; but when the defendant by his replication denies not the freſh ſuit, by proteſtation relies upon this, that he was out of the view, (which is not material, for it is not the form of pleading to ſay he had him in his view, &c.) it appeared not to the court that he had cauſe of action; now this bar is ſufficient for the matter, but inſufficient for the form, and there being no demurrer, but a replication, no advantage ſhall be taken of the bar for matter of form. 3 *Co.* 52. *Poph.* 41.

Eſcape in *London*, retaken in *Devon*.

Ill on a demurrer.

Action on the caſe for voluntary eſcape; defendant pleads, he eſcaped in *November* by negligence, and traverſed not voluntarily, and that he freſhly purſued and took him, and that *poſtea*, *viz.* 27 *Aug.* he died; to which the plaintiff demurred, becauſe before the eſcape, and eſpecially for the void traverſe. But *per cur'*: The alledging the voluntary eſcape is immaterial, and the ſheriff chargeable without it, and he need not traverſe the voluntary eſcape; but becauſe he doth not ſay he did *ante exhibitionem billæ*, judgment for the plaintiff. 3 *Keb. Rep.* 55. *pl.* 35.

Traverſe that he died after freſh purſuit, but ſaith *ante exhib. billæ.*

The plaintiff declared of an eſcape voluntary; the defendant ſhews a negligent eſcape, it is good without a traverſe. *Latch* 203.

Nar. of voluntary bar by negligent eſcape.

In debt on eſcape, plaintiff declares, that the defendant (ſheriff of *Devon.*) ſuffered one *C.* who was in execution, to eſcape in *London*, 18 *Dec.* defendant pleads, that the ſaid *C.* eſcaped the 16 *Dec.* in *com' Devon'*, and that he freſhly purſued him, and retook him the 17 *Dec.* and retained him again in execution, *abſque hoc*, that he is guilty *alit' vel alio modo*. On this it is demurred, becauſe the eſcape is ſuppoſed to be the 18th of *December*, and he pleads the eſcape the 16th of *December*, and the retaking the 17th of *December*; and ſo he anſwers not to the eſcape mentioned in the declaration, for the traverſe *after vel alio modo* doth not anſwer to the time, but to the manner of any thing alledged: and *per cur'*, the plea is ill. *Cro. Eliz.* 439. *pl.* 55.

Defendant muſt anſwer to the eſcape as to time, &c.

On *Nil debet* in eſcape, freſh purſuit may be given in evidence.

On *Nil debet* pleaded in eſcape, freſh purſuit may be given in evidence; ſo a releaſe, or any thing that deſtroys the duty. *Mod.* 116. 3 *Keb. Rep.* 306. *pl.* 47.

Debt for eſcape, not within ſtatute of limitations.

Debt for an eſcape is not within the ſtatute of limitation, though action on the caſe is. The words of the ſtatute are, "All actions of debt grounded on any lending or contract, without ſpecialty, ſhall be brought within ſix years. *Sid.* 305, 306. *pl.* 14. *Saund.* 58. *Lev.* 191.

Now firſt, this action is not founded on any lending or contract; here is a duty created by the law without lending or contract. 2 *Inſt.* 388.

'Tis founded on a ſpecialty.

2. This action is founded on a ſpecialty, (*viz.*) on a ſtatute law; for at common law no debt on eſcape lay againſt a gaoler, *&c.* of one out of execution. And the ſtatute of 1 *R.* 2. *c.* 12. gives the action of debt againſt the warden of the *Fleet*; and this ſtatute, by conſtruction, extends to all other gaolers and ſheriffs. *Saund.* 37, 38. *Lev.* 191. *Sid.* 305. *pl.* 14.

Acknowledgment of ſatisfaction on record, a good plea.

The ſheriff brought an action on the caſe againſt *J.* for making his eſcape out of execution; defendant pleads confeſſing all the matter, and that after this eſcape, he, at whoſe ſuit he was condemned, had acknowledged ſatisfaction on record. To which it was demurred. *Per cur'*: The plea is good, becauſe the defendant is to be charged, for that the plaintiffs are chargeable with the debt, and not otherwiſe; and the defendant hath pleaded ſatisfaction acknowledged on record, which may by his means, and is not denied; for otherwiſe the plaintiff might have ſhewed the ſpecial matter by replication. *Cro. Eliz.* 237. *pl.* 3. *Leon.* 237. *pl.* 321.

Accord, with ſatisfaction, where no plea.

Accord with ſatisfaction is no plea. In *Scire fac.* on judgment in eſcape on *Oyer*, the defendant pleads *Executio non*, becauſe that after the judgment the defendant aſſigned the obligation of ſecurity of *T.* the party who eſcaped, which the plaintiff received and accepted. To which the plaintiff demurred. And *per cur'*: Accord with ſatisfaction is not pleadable after a judgment. 3 *Keb. Rep.* 255. *pl.* 89.

Debt

Debt on eſcape againſt the ſheriff upon a *Capias utlagat'* after judgment. Defendant pleads there was no ſuch record of the debt and damages. It is a good plea on demurrer. *Brownl.* 51. *Hob.* 209. *pl.* 263. *Nul tiel record.*

In debt on eſcape one may plead, that the plaintiff commanded him to let him out of execution. *Cro. Car.* 329. *pl.* 12. Command of the plaintiff.

In *Scire fac'* on a recognizance, as bail in a writ of error in the *Exchequer Chamber*. The defendant pleads, that the plaintiff ſued a *Capias ad ſatisfaciend'* out of the *King's Bench* to the ſheriff of *Middleſex*, and he was taken in execution thereon, and ſuffered to eſcape by the plaintiff's conſent. The plaintiff demurs, becauſe they do not lay a place where the court was held, nor where the party eſcaped by conſent. 2 *Keb. Rep.* 567. *pl.* 73. *Mod. Rep.* 19. Eſcape by conſent of the plaintiff, pleaded. Place omitted.

Payment of the money to the marſhal is no bar, but payment to the ſheriff on a *Fieri fac'* is good; for he is commanded to levy the money, *&c.* but no ſuch authority is given to the marſhal. 2 *Jo.* 97. Where payment of the money is good, or not.

In eſcape, the defendant pleads a releaſe of him who recovered, to the priſoner, being in execution; it is holden no plea in debt on eſcape. 19 *H.* 6. 14. Releaſe pleaded. *Nil debet.*

In caſe for the eſcape of *Mary Oglethorpe*, the declaration ſet forth, that *Mich.* 2 *Geo.* in *C. B.* the plaintiff recovered judgment againſt her for 232 *l.* which coming into *B. R.* by writ of error, the writ was *non pros*, and execution awarded, which judgment is ſtill in force: that 12 *June* 2 *Geo.* the ſaid *Oglethorpe* ſurrendered herſelf to the *Fleet* in diſcharge of her bail, from whence ſhe was removed by *Habeas corpus* to *Newgate una cum die & cauſa, &c.* where the plaintiff intended to charge her in execution, but the defendants, ſheriff of *Middleſex*, voluntarily permitted her to eſcape. The defendants confeſs the ſaid *Oglethorpe* in their cuſtody, *prout, &c.* but ſay that 20 *Junii* a *Habeas corpus* was delivered to them, requiring them to bring her to the Chief Juſtice's chamber, upon which they made a warrant to their bailiff, commanding him to carry her and bring her ſafe back again, by virtue of which he took her out *Qu.* whether a reſcue upon a *Habeas corpus* between judgment and execution, be pleadable to an action of eſcape?

of *Newgate*, and in carrying her along ſhe was reſcued. The plaintiff demurs, and *Mich.* 5 *Geo. Yorke pro quer'* took three exceptions to the manner of pleading.

1. It is improperly pleaded; they ſhould not have ſet forth the fact, but the operation of law reſulting from that fact: therefore pleading the reſcue from the bailiff is wrong; it ought to have been as from the ſheriff, for the law takes no notice of a bailiff, or his acts. In *Coke*'s caſe, *Hil.* 2 *Geo.* a reſcue was returned on a bill of *Middleſex* in this form: That a *Capias ad ſatisfaciendum* iſſued to the ſheriff, who thereupon took the debtor, and the reſcue was made of the priſoner under that arreſt; exception was taken, that this return was only argumentative, becauſe an eſcape of one in cuſtody of the ſheriff is an eſcape for all ſuits wherein he had proceſs. The return indeed was held good, it being *veritas falſi*; but the court held it would have been otherwiſe in pleading. 2 *Saund.* 97. If one jointenant pleads that the other *conceſſit* to him, it is ill; for it ſhould have been pleaded as a releaſe, that being the only proper conveyance between jointenants. 2 *Vent.* 149, 260, 266. 3 *Lev.* 290. That was pleaded as a grant, which could only enure as a covenant to ſtand ſeiſed; and the plea was held ill, for it ought to have been pleaded according to the effect of it in law. *Salk.* 8, 274.

2. The defendants ought to have averred, that ſhe was not afterwards found *in balliva ſua*. *Dalt.* 215, 216. *Officina Brevium* 203, 204, 217, 226.

3. The *Habeas corpus* requires her to be brought *ſub ſalvo et ſecuro conductu*, but the defendants have not ſhewn that they complied with this direction; and this they ought to do do, when they plead a reſcue.

As to the principal point, whether the reſcue here pleaded be a ſufficient excuſe, I muſt obſerve, that ſuch returns have never been favoured, becauſe there may be fraud and combination impoſſible to be diſcovered, and they infer a reflection upon the King,

King, by ſuppoſing an unlawful force, as appears by *Weſtm.* 2. *c.* 39. which recites, that the ſheriffs *multotiens falſum dant reſponſum, mandando quod non potuerunt exequi præceptum regis propter reſiſtentiam:* And concludes, *Caveant vicecomites de cætero, quod hujuſmodi reſponſio redundat in dedecus domini regis et coronæ ſuæ.* A return of a reſcue may diſcharge the ſheriff againſt the King, but not againſt the party. Formerly ſuch a return of a reſcue upon *meſne* proceſs was held not pleadable, becauſe the ſheriff might take ſufficient power of the county. *Cro. Eliz.* 868. But ſince in the caſe of *May* v. *Proby*, *Cro. Jac.* 419. 3 *Bulſtr.* 198. *Moor* 852. *Rol. Abr.* 807. it has been reſolved, that the arreſt being on *meſne* proceſs, and not upon execution, the ſheriff is not bound to take the *poſſe comitatus*, and therefore *Reſcous* is a good return: but if the priſoner had been once in the gaol, the ſheriff ought to keep him at his peril, and *Reſcous* is no excuſe, for he is to take care that his priſon be ſtrong enough to keep the priſoners. And upon proceſs of execution, ſuch a return is no excuſe againſt the King or the party, for the proceſs being once executed, the party can have no other. From this caſe I draw two inferences, 1. That when the priſoner is once in gaol, a reſcue thence will be no excuſe to the ſheriff. *Rol. Abr.* 807. *pl.* 3. 33 *H.* 6. 1. 4 *Co.* 84. *a.* is a much ſtronger caſe than the preſent; for there it is held that if rebel ſubjects break the priſon, whereby the priſoners eſcape, this is no excuſe, though it is otherwiſe where it is done by foreign enemies. In 33 *H.* 6. 1. the caſe was adjourned; but in 16 *Ed.* 4. 3. it is reſolved by all the judges: and the marſhal of *B. R.* was forced to get an act of parliament. 2. The other inference is, that wherever the ſheriff may raiſe the *Poſſe*, he is not excuſable for a *Reſcous*, becauſe no power is by intendment able to reſiſt the ſheriff and his *Poſſe*. 8 *H.* 4. 19. The priſoner here is to be taken to be in actual cuſtody. It cannot be intended the *Habeas corpus* was ſued out at the inſtance of the plaintiff, and the ſheriff might have raiſed the *Poſſe*; the very words of

of the writ ſuppoſe it, *ſub ſalvo et ſecuro conductu.* Since it appears therefore, that the ſheriff is liable for the reſcue of one in execution, and for a reſcue out of the priſon where the cuſtody is on *meſne* proceſs only, becauſe in theſe caſes he may raiſe the *Poſſe*; I can ſee no reaſon to diſtinguiſh this caſe from thoſe, and why he may not have the *Poſſe* in one as well as in the other.

Bootle contra. As to the firſt objection, we may plead either according to the truth of the fact, or the operation of the law upon that fact, and either way is good. *Palm.* 532. 2. We have confeſſed and avoided the eſcape, and the caſes cited are of returns, where it may be neceſſary to ſay, the party was not afterwards to be found in his bailiwick, becauſe according to the latter reſolutions, *Ventr.* 269. which denies the ſheriff of *Eſſex*'s caſe in *Hob.* 202. the priſoner may be retaken, and therefore the return muſt anſwer every poſſibility, which need not be done in pleading. The third objection depends upon the principal point, as to which I muſt obſerve, that it appears *Oglethorpe* was not in execution, for which reaſon caſe is brought, becauſe the 1 *Rich.* 2. *c.* 12. gives debt only for the eſcape of one in execution. 11 *Hen.* 4. 11. *A.* wounds *B.* and being in the cuſtody of the conſtable, eſcapes, and then *B.* dies; the conſtable is not anſwerable as for the eſcape of a felon. *Salk.* 614. 2 *Mod. caſe* 158. At this day a reſcue upon *meſne* proceſs is a good excuſe, though the former opinions were otherwiſe. 3 *Lev.* 46. 2 *Lev.* 144. & 2 *Cro.* 419. there is a great difference between priſoners at large, and thoſe in actual cuſtody; the latter by *Weſtm.* 2. *c.* 11. may be kept in irons: but that extends only to ſuch as are within the walls of the priſon. One in cuſtody out of the priſon is not required to have ſo ſtrict a guard, and therefore though a reſcue out of the gaol of one in upon *meſne* proceſs makes the ſheriff liable, yet he is not ſo for the reſcue of a perſon not carried to gaol. On a *Habeas corpus* the ſheriff may go out of the way with the priſoner, provided he has him ready at the return of the writ. 3 *Co.* 44. *a.* The ſheriff

ſheriff is obliged to bring out the party in obedience to the King's writ, and he is not compellable to have a ſtricter guard than for a perſon arreſted on *meſne* proceſs. A common *Capias* has the words *ſalvo cuſtodias* as well as the *Habeas corpus*; ſo no inference can be drawn from the wording of the writ. The reaſon why the ſheriff ſhall raiſe the *Poſſe*, in caſe of execution, doth not hold in this caſe; for the party doth not loſe his debt, nor even his proceſs, for there may be a re-caption. The ſtatute of *Marleberge*, *c.* 21. & *Weſtm.* 1. *c.* 17. *Weſtm.* 2. *c.* 39. are but in affirmance of the common law. 2 *Inſt.* 454. For the ſheriff might have had the *Poſſe* before. But though he may, yet he is not obliged to raiſe the *Poſſe* upon every occaſion; for it is to be preſumed men will act according to law, and the contrary is never ſuppoſed. 10 *H.* 7. 26. The ſheriff in this caſe might plead a re-caption. *Godb.* 177. And as on a *Habeas corpus* he may let the priſoner go out of the way, it ſhews he is only conſidered as a perſon in cuſtody upon *meſne* proceſs; eſcapes being ſo penal, the judges have always made a favourable conſtruction for the officers. 3 *Co.* 44. *a.*

Yorke replied, This is more than a cuſtody on *meſne* proceſs. The demand *tranſit in rem judicatam*, and if the ſheriff is not liable, it will be very eaſy to bring a *Habeas corpus* for no other end but to let the priſoner eſcape.

Chief Juſtice. Here the fact pleaded is true, that ſhe was in the cuſtody of the bailiff, and reſcued from him: and though this amounts in law to the cuſtody of the ſheriff, yet it differs from the caſes of grants, for there the fact was not true. It was not a grant, but a releaſe, and a covenant to ſtand ſeiſed; but here the fact is true, and properly pleaded. 2. The defendants have confeſſed and avoided, and therefore it lay upon the plaintiff to ſhew a re-caption in his replication. The third objection likewiſe has nothing in it, for the words of a common *Capias* are as ſtrong.

As

As to the principal point, I cannot ſee how this caſe is diſtinguiſhed from a cuſtody on *meſne* proceſs, where a reſcue is pleadable. The ſheriff was obliged to bring her out, and as ſhe was not in execution, ſhe can only be ſaid to be in upon *meſne* proceſs. *Powys* Juſtice accord.

Eyre Juſtice inclined the reſcue was a ſufficient excuſe, and well pleaded.

Forteſcue Juſtice *accord*, as to the firſt objection. As to the ſecond, I think the plea ſhould have gone on; and ſaid, ſhe was not found afterwards. As this ſtands, there may be an intendment that ſhe was. As to the third, it appears ſhe was carried by one ſingle officer, which is certainly a neglect. This is a ſort of middle proceſs after the plaintiff has run a long race; and though the crown may command the ſheriff to bring out his priſoner, yet that is without prejudice to the party. She ought to be conveyed as ſecurely as ſhe is kept, and the ſheriff here may have his remedy againſt the reſcuers. He might, before he brought her out, have inſiſted on money to pay a guard.

Hil. 7 Geo. It was argued a ſecond time, by *Wearg pro quer'*. The queſtion is, Whether after judgment, and before any charge in execution, a reſcue on the party's being brought out on a *Habeas corpus* be a good excuſe for the ſheriff in an action of eſcape?

To prove it no excuſe, I ſhall conſider, 1. What are the grounds of this action, taking it as intirely new. 2. Compare it with the reſolutions already in the books. 3. The objections that have been, or may be made.

1. To conſider the foundation of ſuch an action; and that is, the damage which the plaintiff has ſuſtained by the neglect of the defendant, which he might have prevented by the uſe of thoſe means that he had in his power; for the law ſuppoſes the *Poſſe* to be a ſufficient defence againſt a reſcue, and that no force is able to reſiſt the ſheriff and his *Poſſe*. Here is not the act of God, as fire; or any foreign force, as the caſe of enemies, which I admit are excuſes for the ſheriff. 33 *Hen.* 6. 1. 16 *Ed.* 4. 3. 4 *Co.*

4 *Co.* 84. *Rol. Abr.* 808. The ſheriff may, if he pleaſes, raiſe the *Poſſe* in execution of any proceſs whatſoever. 2 *Inſt.* 193. 3 *Hen.* 7. 1 *Dalt. Sher. cap.* 20. *p.* 104. *cap.* 95. *p.* 354, 5. The plea admits the neglect, and the officer has a fee. 3 *Bulſtr.* 212. *Cro. Eliz.* 873. *Vent.* 268. *Winch* 90. 21 *Ed.* 3. 45. *b.*

2. The caſes in the books. I would compare this with the caſe of a reſcue of one taken upon *meſne* proceſs before he is carried to gaol. In Queen *Elizabeth*'s time this queſtion was determined againſt the ſheriff. 3 *Cro.* 868. *Noy* 40. But I admit it has ſince been reſolved otherwiſe. 3 *Bulſtr.* 198. And now it is held, that the ſheriff ſhall not be anſwerable. 2 *Cro.* 419. *Rol. Abr.* 807. *Dy.* 1. *Lev.* 144. 3 *Lev.* 46.

But taking the law according to the latter reſolutions, I ſhall ſhew, that the reaſons they go upon do not affect this caſe.

1. In the caſe of *meſne* proceſs, though the ſheriff may, yet he is not bound to raiſe the *Poſſe*. *Dalt.* 154. But in this caſe, where the priſoner is conveyed by proceſs after judgment, he ought to take the ſame caution as if he was upon a *Capias ad ſatisfaciendum*, nay a greater, if he obſerves the words of the *Habeas corpus*, which require him to convey the priſoner *ſub ſalvo & ſecuro conductu*. Beſides, this is a proceſs not ſo eaſy to be renewed as a *Capias ad ſatisfaciendum* or *meſne* proceſs. *Cro. Car.* 240, 255.

2. Another reaſon why reſcue on *meſne* proceſs is an excuſe, is, becauſe of the multiplicity of ſuch writs, which are executed at the ſame time in different parts of the county, which makes it impoſſible for the ſheriff to raiſe the *Poſſe*; but this is a writ that rarely iſſues, and there is no danger of having many of them to execute at the ſame time.

In the caſe of *meſne* proceſs, the plaintiff has the conduct of that, but the defendant may purchaſe the *Habeas corpus*.

3. The objections are, 1. That we may have our remedy againſt the reſcuers; but will not they ſend us back again to the ſheriff? Beſides, it is a doubt whether

whether the plaintiff has any remedy againſt the reſcuers; the ſheriff indeed has, and therefore he is not hurt by being ſubjected to our action. *Hutt.* 95. 2 *Cro.* 419. *Cro. El.* 53. The wrong is done by both the ſheriff and the reſcuers. *Rol. Abr.* 698. *B.* 3.

2. Say they, Why ſhould the *Habeas corpus* put the ſheriff in a worſe condition, when he is obliged to bring her out in obedience to that command? But we ſay, No command of the crown can excuſe him as to the ſubject. *Dy.* 296. *b.* 297. *a. Rol. Abr.* 808.

3. It is objected, that this will be a hard caſe upon the ſheriff, who may be ruined by combinations between the plaintiff and defendant. But has not the law furniſhed him with means to prevent any thing of that nature, by inveſting him with a power to raiſe the *Poſſe?*

Upon the whole, it appears here has been a neglect, an interruption of the courſe of juſtice, a damage to the plaintiff, for which he ought to have redreſs.

Reeve contra. This is a reſcue of one in cuſtody on *meſne* proceſs only, and not out of the walls of the priſon; for ſhe was brought thence by the King's command, which the ſheriff was bound to obey. And 4 *Co.* 44. it is ſaid, that every thing is to be taken moſt favourably for the officer. In the caſe of a *Capias ad ſatisfaciendum*, the reaſon why the ſheriff was liable was, becauſe the party could have no new writ. *Hob.* Sheriff of *Eſſex*'s caſe. Though it is otherwiſe reſolved ſince, that the party himſelf may retake him. *Sid.* 330. *Lev.* 211. 2 *Keb.* 340. 2 *Lev.* 109, 132. *Ventr.* 267. *Show.* 177. But what if he is reſcued on *meſne* proceſs, and cannot be retaken, does not the plaintiff loſe his debt as much as in the caſe of an execution? The reaſons now given for that caſe are not given in the books.

This is no more than a cuſtody on *meſne* proceſs out of the walls of the priſon; every common *Capias* has the words *ſalva cuſtodia*, ſo no argument can be

be drawn from thoſe words in the *Habeas corpus*. The ſheriff is liable in no caſe for a reſcue, but where he was obliged to take the *Poſſe*, which here he was not. If the ſheriff, after the party is charged in execution, brings him out on a *Habeas corpus*, it is no eſcape if he go out of the direct way. 3 *Co.* 44. *Moor* 257.

And as to the objection, that the plaintiff is no party to the ſuing out the *Habeas corpus*, is not that the caſe where there are ſeveral proceſſes charged againſt the ſame perſon, and he is reſcued when taken on one only? And though the warrant is to one bailiff only, yet there is no argument of a neglect, becauſe that bailiff had it in his power to raiſe the *Poſſe*, without reſorting back to the ſheriff.

Adjournatur. And this term *Pratt* Chief Juſtice delivered the reſolution of the court.

It was admitted at the bar, and is not now to be diſputed, but that on the one hand if the ſheriff arreſts the party by virtue of *meſne* proceſs, and he is reſcued as he carries him to gaol, it will be a good excuſe for the ſheriff. *Cro. Jac.* 419. And on the other hand, if the party be once within the walls of the priſon, though the cuſtody be on *meſne* proceſs only, yet a reſcue from thence by any but common enemies will be no excuſe. If a company of rebels break the priſon, and let out the priſoners, yet the ſheriff is anſwerable, becauſe the law ſuppoſes the ſheriff and his *Poſſe* are ſufficient to reſiſt ſuch a force. *Rol. Abr.* 811. 4 *Co.* 84. Theſe, I ſay, are grounds that are not to be diſputed.

The caſe at bar is new, and differs from both theſe; but, however, we muſt take it up upon the different reaſons of thoſe caſes. In the caſe of *meſne* proceſs the ſheriff, if he meets the party againſt whom he has ſuch proceſs by accident, and is told it is the defendant, he is bound to arreſt him; and then, becauſe it is not ſuppoſed that he has always the *Poſſe* along with him, he is excuſed againſt a reſcue. But in the preſent caſe there is no ſuch danger of ſurprize; he has notice before, that ſuch a day he is to bring the party out of priſon, and it is his duty, and

ſo he is directed by the writ, to provide for the ſure and ſafe conduct of the party. Here he has not taken that caution, whereby the plaintiff, who had an intereſt, a ſort of property in the body of the priſoner, has ſuſtained a damage. This damage has happened by the neglect of the ſheriff, and therefore he muſt anſwer it to the plaintiff in this action. Judgment *pro quer'*. *Stra.* 429.

That he eſcaped by the ſheriff's licence, is good without a traverſe.

In treſpaſs and impriſonment the defendant juſtifies by virtue of a *Capias*, and the plaintiff did afterwards eſcape, and he being ſheriff did follow him by virtue of the ſaid warrant, and took him upon the *Capias*. The plaintiff replied, he eſcaped by licence of the ſheriff, and traverſe of the latter taking by virtue of the warrant. *Per Cur':* The traverſe is idle, becauſe the plaintiff had ſufficiently confeſſed and avoided, and if he eſcaped by the ſheriff's licence, that ought to be the thing put in iſſue, and not the traverſe. *Brownl.* 197.

Plea by a ſerjeant of *London*.

Action on the caſe upon eſcape was brought againſt a ſerjeant of *London*. He pleads that the ſheriff commanded him to deliver his priſoner to him, which he did, and traverſed that he was guilty of the eſcape, *aliter vel alio modo*. *Per Cur':* The ſerjeant is an officer of the ſheriff, and the uſual manner of pleading is to plead, that the priſoner was in cuſtody of the ſheriff; and ſheriffs in *London* may make their houſes their priſons, as well as the counters, and the bar was good, but the traverſe was ill. *Sid.* 318. *pl.* 6. 2 *Keb. Rep.* 147. *pl.* 22.

Traverſe *aliter vel alio modo*.

Traverſe ill.

Not guilty, better.

This plea is a confeſſion and avoidance, and the traverſe is ill. But, *per Cur'*, here is no eſcape confeſſed, and therefore *Not guilty* ſhould have been pleaded, and not to take a traverſe.

Three years ſpecified.

Debt againſt the ſheriffs of *London* upon eſcape of *A*. The plaintiff declared on an execution by force of the recovery, and that the party was in the priſon of *Ludgate*, *ſub cuſtod' J. S. &c. J. D.* then ſheriffs, 1 *H.* 8. and that he is ſo continued *ſub cuſtodia J. N.* and *J. L.* 3 *H.* 8. and then was ſuffered to eſcape. *J. N.* and *J. L.* pleaded, that before the eſcape at ſuch a day, *Anno ſuperius in narratione*

And one pleaded to, but not preciſely.

ione specificato, the said *J. D.* and *J. S. adtunc vicecomites* suffered him to escape.

Per Cur': It is no plea, because there were three years specified in the declaration, and it shall be taken that it was the first or third of *H.* 8. when they were out of their office; yet it is merely induced by the *adtunc vicecomites*, which shall lead the intendment to be in the year in which the defendant supposeth they were sheriffs.

Plea to be precise as to time.

But *per Cur'*, That sufficeth not, but the plea must be alledged in fact; and therefore the defendant's meaning to discharge themselves by former escape, which was not in their time, should alledge it precisely. *Dy.* 66.

It must be alledged in fact.

In debt for an escape of one in execution defendant pleads *Nil debet*; and after issue, and the cause entered for trial, the defendant would acknowledge the action with *relicta verificatione*. But, *per Cur'*, This he may not do without the assent of the plaintiff; for many defects are aided by verdict. 2 *Jones* 156.

After *Nil debet* he may not relinquish his plea.

The plaintiff chargeth the defendant with an escape 13 *April* 18 *Jac.* and the defendant pleads escape 29 *Feb.* 16 *Jac.* which was a year and two days before the escape alledged by the plaintiff; to which the defendant made no answer, and although he concluded it was the same escape, which makes the plea good where the time is not material, yet in the principal case the time seems to be material; for the defendant (the marshal) pleads, that the prisoner was committed to him, by *Habeas corpus*, and that he remained in his custody from such a time till such time, during all which time the plaintiff never prayed to have the said prisoner in execution. *Bridg.* Rep. 7.

Where the time is material, the conclusion that it was the same escape, will not make it good.

Debt for 20 *l.* against the defendant for escape. The plaintiff declares, that he recovered a judgment against *Clerk*, and sued a writ of execution, *viz.* a *Capias ad satisfaciendum* directed to the defendant sheriff of *Essex*, to take *Clerk*, which was delivered to the defendant, and that the defendant took him in execution the 16th of *July*, and let

him eſcape the 25th of *July* at *London* in *Cheapſide*. The defendant pleads, that before the 25th of *July*, *viz.* the 17th, a *Habeas corpus* iſſued out of the *Common Pleas*, to bring the body of *Clerk* to the *Common Pleas ad tres Michaelis* next following; that this writ was delivered to him, and that he by virtue thereof brought *Clerk* the 18th of *July* from *Chelmſford* by *London* the ſhorteſt way, and at *tres Michaelis* delivered him at the *Common Bench*, to be committed in execution. The plaintiff, *Proteſtando* that the defendant did not bring *Clerk* by *London*, ſaid that the *Habeas corpus* was delivered to him the firſt of *October*, and not before. The defendant rejoins, that the *Habeas corpus* was delivered to him before the firſt of *October*. And the plaintiff demurs. And adjudged for him for an apparent fault in the rejoinder, becauſe the defendant ought to have ſaid, that the writ of *Habeas corpus* was delivered to him, before he brought *Clerk* out of priſon; for it ſignifies nothing to ſay, that it was delivered before the firſt of *October*, becauſe that appears to be ſubſequent to the time of the eſcape. But by *Powell* Juſtice, the matter of law is with the plaintiff; for

Habeas corpus.

if an *Habeas corpus* is delivered to the ſheriff in *July* to bring a man in execution to the *Common Pleas* next *Michaelmas* term, the ſheriff may take a reaſonable time, of which the court will judge according to the circumſtances; but he cannot bring him out of priſon, and keep him out of priſon all the vacation. But *Treby* Chief Juſtice ſaid, that he would not determine that point. And therefore for another reaſon judgment was given for the plaintiff. [S. *Hob.* 202.] Ld. *Raym.* 241.

Superſedeas pleaded, but the return of the writ miſtaken.

In an eſcape, the defendant confeſſeth that *H.* was in his cuſtody by *Latitat*, returnable *Mercurii craſtino animarum*, but ſaid, that a *Superſedeas* came to him (which varied from it) reciting a writ *die Veneris craſtino animarum*; for which variance the plaintiff demurred as being not the ſame action, which the court agreed. *Keb.* 234. Earl of *Bedford* againſt *Auſtin.*

In action on eſcape in debt on judgment, defendant pleads, that after he was arreſted, he was diſcharged by protection ſhewed to the bailiff, as ſervant to the Earl of *Bath*. *Per Cur'*: The plea is naught. *Keb.* 660. *Cockman* and *Symonds*. Protection not allowed.

In action on the caſe on mean proceſs, ſheriff pleads, that a writ of privilege came to him *Teſte* Marqueſs of *Newcaſtle*, returnable at ſeſſions; which recites, that by the law of *Englond*, pe ſons ſhall be privileged in going to, and returning from the ſeſſions. To which the plaintiff demurs, and the court held the plea to be ill; yet the court were in doubt upon a ſecond motion, whether the privilege ſhall extend to ſuch inferior courts. Alſo it is ill pleaded, not ſhewing where the writ iſſued, nor where the ſeſſion was, nor whether the diſcharge were in ſeſſion. *Sid.* 269. *pl.* 22. *Keb. Rep.* 845. *pl.* 38. Privilege of ſeſſions pleaded. Not allowed.

In action on caſe of eſcape and falſe return, if the ſheriff demurs generally upon the declaration, he loſeth the advantage of pleading. Stat. 23 *H.* 6. c. 10. The advantage of pleading the ſtatute 23 *H.* 6. loſt by demurrer.

In action of eſcape, *Venire* ſhall not be changed, nor in debt; for theſe may be all over *England*. *Styl.* 107, 241. *Venire* changed, when.

By the marſhal's privilege, the jury on eſcape were changed out of *London* into *Middleſex*. 2 *Keb. Rep.* 818. *pl.* 24.

Hale ſaid, he knew him after imparlance ouſted of this plea; but here the court would not put him to plead it, but granted a trial in *Middleſex*, and eſcape in *London*, being ſo every where. *Cro. Eliz.* 425.

Venire is moſt proper to be from the place where the eſcape was. From whence.

Action is brought againſt the defendant as ſheriff for the eſcape of *R.* in *Norfolk*, and falſely returning *Non eſt inventus* in *B. R.* the falſe return is not the principal, but the eſcape is the cauſe of action; and the falſe return which is alſo made in *Norfolk* is but aggravation, the party may lay it in either county. *Keb. Rep.* 771. *pl.* 6. Action laid in either county.

Difference. Where the *Venire* and return differ, it is not good. *Hetl.* 85.

No coſt on nonſuit. *Per Cur:* No coſt ſhall be on nonſuit in this action, by the ſtat. 32 *H.* 8.

Bar that he eſcaped *contra voluntatem.* It has been adjudged as well on *Scire fac'* as in debt, that to plead he was in execution, and *contra voluntatem* of the ſheriff eſcaped, is no plea; no, though it were by permiſſion. See 3 *Keb. Rep.* 305. *pl.* 47. *Cro. Car.* 24.

If the plaintiff order the ſheriff, to let a man, who is in execution at his ſuit, go at large, and he does ſo accordingly; it is a good bar in debt for the eſcape. *Dalt.* 77. If in ſuch caſe the ſheriff refuſe to let him go at large, an action of falſe impriſonment lies againſt him; and there the lord *Coke* ſays, the ſheriff is bound to take notice of the plaintiff. 3 *Bulſt.* 98. and 2 *Cro.* 379. to the ſame purpoſe. Ld. *Raym.* 555.

Eſcape by conſent of plaintiff. To a *Scire fac'* on recognizance as bail in error, defendant pleads, that the plaintiff after judgment ſued a *Capias ad ſatisfaciend'* out of the *King's Bench*, and that the defendant was thereupon taken, and that he eſcaped by conſent of plaintiff. *Per Cur':* The plea is ill for want of place; it is not ſaid where the court was held, nor whether the party eſcaped by conſent. 2 *Keb. Rep.* 567. *pl.* 73. *Mod.* 10. *pl.* 49.

But by voluntary eſcape, ill as to party plaintiff. To *Scire fac'* on judgment in debt, defendant pleads a *Capias ad ſatisfaciend'* iſſued out of the court of *King's Bench*, and that he was taken thereupon, and on *Habeas corpus* out of the *Common Bench*, he was committed to the cuſtody of the warden of the *Fleet*, and that the warden ſuffered him voluntarily to eſcape. To this it was demurred, becauſe he concludes not aright: and *per Cur'*, the execution muſt be alledged by matter of record, and therefore he muſt conclude his plea, *prout patet per recordum:* the difference is between proceſs that requires no return, and where the record whereby he is committed is ſhewed, the *Committitur* in an action of eſcape is but inducement, but in a juſtification it is ſubſtance. Upon a *Capias* or *Latitat* he need not ſo conclude, but

Prout patet per record.

Committitur, where but inducement and where ſubſtance.

but here is matter of record alſo, here the matter of the bar is not the matter of fact, but the having ſued out execution on record. And ſecondly, It is all one as to the party, whether he eſcape by the ſheriff's negligence, or voluntarily. If the party negligently eſcape, the party and the ſheriff may take him again; but if voluntarily, then only the party may take him again, but not the ſheriff; but if the ſheriff let him go by conſent of the plaintiff, then neither can take him; and bar by voluntary eſcape is held ill. Judgment *pro quer'*. 2 *Keb. Rep.* 189. *pl.* 21, 206. *pl.* 43. *Sid.* 330. *pl.* 12.

Negligent.

Voluntary.

Conſent of plaintiff.

In *Audita querela*, voluntary eſcape in the ſheriff is no good ſurmiſe, but that the ſheriff may retake him again. *Rol. Abr.* 902. *Hob.* 202.

Audita querela.

In debt for eſcape on *Nil debet* pleaded, the defendant may give freſh purſuit in evidence. And by *Hale*, at a trial at bar, ſaid, He always let them give in evidence freſh purſuit on *Nil debet*, and by *Wild*, it is done generally. *Mod.* 116. 3 *Keb. Rep.* 305. *pl.* 47.

On *Nil debet* freſh purſuit given in evidence.

In action againſt a gaoler upon eſcape of a priſoner in execution: if the iſſue be, whether the gaoler immediately after the eſcape made freſh ſuit againſt the priſoner, *&c.* and the evidence is given, that a priſoner eſcaped out of priſon by the negligence of his keeper, and is abſent a day and a night, and the keeper knows it not (having many other priſoners under his care); but when he had notice of it, he immediately makes freſh ſuit after him and retook him; this is an immediate freſh ſuit to maintain the iſſue, for convenient purſuit is an immediate purſuit in law. 2 *Rol. Abr.* 681. On evidence at the bar, where the evidence was, that he eſcaped at nine o'clock at night, and the notice and freſh ſuit on which he was retaken, was the next morning at nine o'clock.

Evidence in freſh purſuit.

Which is a freſh purſuit.

Iſſue was, whether *A.* was taken by a *Capias* at the ſuit of *B.* and evidence was taking by a *Capias* at the ſuit of *C.* and then a delivery of *Capias* at the ſuit of *B.* to the ſheriff; it is good evidence; for though he were taken before, yet this is a new

If taking at the ſuit of *B.* evidence was at the ſuit of *C. &c.*

taking in law as to this execution. So if the iſſue be of a taking on a *Capias utlagat'*, or *pro fine* with a prayer of the plaintiff, that he may remain for ſatisfaction.

Alias Capias. Iſſue was, whether *J. S.* was taken with a *Capias?* Evidence was given by an *Alias capias*, and good. *Hob.* 54.

Evidence of freſh purſuit. In debt on eſcape againſt the marſhal, and *Nil debet* pleaded, the evidence was an *Habeas corpus ad teſtificand'*, and that the priſoner went down too long before-hand, and ſtaid too long after the aſſizes were done at *Wells*, and that he went ſixty miles beyond *Wells* before he returned again. *Verdict pro quer'* for 620*l.* *Mod.* 116.

Ne unques en ſon gard, how tried. In eſcape upon a *Capias* returned, *Ne unques en ſon gard* ſhall be tried by record. But upon a *Capias* not returned, the priſal ſhall be tried *per pais*. 2 *Rol. Abr.* 574.

Impriſonment on the execution, how to be tried, how in the caſe of mayor of the ſtaple. The impriſonment upon the execution, and not for other caſe in eſcape, ſhall be tried by the record. But in eſcape againſt the mayor of a ſtaple, for ſuffering *J. S.* in execution upon a ſtatute ſtaple to go at large, if the defendant ſay he was not in priſon upon the execution, but upon plaint there, this ſhall be tried *per pais*, and not by record; becauſe it would be unreaſonable the defendant ſhould certify a record where he himſelf was concerned.

Upon arreſt in one county, and eſcape in another, In eſcape upon arreſt in one county, and eſcape in another county; upon Not guilty, this ſhall be tried where the eſcape is laid, for the action is upon the eſcape. *Rol. Abr.* 602.

To be where the eſcape was. Action on the caſe againſt a ſheriff upon eſcape in *London*, and the arreſt laid to be in *Southampton*. *Per cur'*: The *Viſne* ſhall be where the eſcape was, becauſe that is the ground of the action, and not where the arreſt was. *Cro. Eliz.* 271. *pl.* 1.

Changing the *Viſne*. *Note*; In action on the caſe for eſcape or deceit the court will not change the *Viſne* out of the county where the plaintiff ſuppoſeth the thing to be done. *Sid.* 87.

Arreſt in *York-ſhire*. In action on the caſe againſt the ſheriff of *York* for an eſcape, and declares that he arreſted the priſoner in

in the said county, and after suffered him to escape at *D.* in *com' Nottingham.* To which the defendant pleads Not guilty. This issue may be tried by the county of *Nottingham* only, without joining the county of *York*; for the action and issue is upon the escape, and not upon the arrest.

Escape in *Nottinghamshire.*

Debt against the marshal for suffering *T. B.* in execution at the plaintiff's suit to escape; pleads, he did not suffer him to escape; and gives in evidence, that *T. B.* brought attaint to reverse the judgment, and upon his prayer the court bailed him, that he might prosecute the suit with effect. But this bail was not entered of record. And the court held it good evidence. The escape supposed here is for letting him go by bail, which is the act of the court, and not of the marshal, and may well be given in evidence. *Cro. El.* 5.

Non permisit &c.

Evidence thereon.

Bailing is the act of the court.

By *Wray:* Upon execution sued after verdict, although the party sues attaint, the court usually does not bail him, for the verdict is intended true till reversed, but on good considerations they may. And though the bail be not entered, yet the plaintiff for his benefit may cause it to be entered, and then he may have a *Scire fac'* on the bail, and so is not at any mischief.

Bail upon attaint.

The party being charged in mean process when he was in custody, the evidence may be good without proving any *Committitur*; but if he were in execution, the *Committitur* upon the roll shall be proved. *Sid.* 237.

Committitur to be proved.

In debt *for escape*, if the defendant plead *Nul escape*, he cannot give in evidence no arrest. *Trial per Pais* 174. *Clayt.* 34.

Evidence upon no escape pleaded.

The question was, If the confession of an under-sheriff of an escape be any evidence against the high-sheriff? And adjudged that it is. For though the sheriff is suable, yet the under-sheriff gives him a bond to save him harmless, and therefore it will all fall upon him. And therefore his confession is good evidence, because in effect it charges himself. Lord *Raym.* 190.

Confession of an escape by the under-sheriff is evidence against the sheriff.

Eſcape againſt two, and found againſt one only.

In debt on eſcape, if the plaintiff declare of an eſcape of two, and it is found one only was in execution, yet the verdict is good, and the plaintiff ſhall have judgment. *Sid.* 5.

On the eſcape of *Baron* and *Feme*, the jury found the *Baron* only in execution.

In debt on eſcape, if the plaintiff declares of the eſcape of *Baron* and *Feme* out of execution, on judgment for the debt of the wife *dum ſola*, and the jury find the husband only was in execution, yet the verdict is good, and the plaintiff ſhall have judgment. The jury found not that the wife was taken in execution, (being for debt contracted before coverture). *Sid.* 5. *Keb. Rep.* 371. *pl.* 68.

Verdict finds an erroneous proceſs,

Though the verdict finds an erroneous proceſs, yet the ſheriff ſhall not take advantage thereof. As in debt on eſcape, and ſpecial verdict finds an *Alias* into another county, without a *Capias* in the proper county, and that he was in execution and eſcaped. Judgment *pro quer'* on *Cro. Jac.* 1. *pl.* 1. becauſe the ſheriff is a ſtranger, and ſhall have no advantage thereof. 3 *Keb.* 629. *pl.* 21.

Verdict on *Reſcous* before the day laid, or after.

One reſcued himſelf and eſcaped, and the ſheriff brought action on the caſe. On Not guilty, the jury found he was arreſted *circa* the 26th of *Feb.* and then and there reſcued himſelf. *Per cur'*: Be the *Reſcous* before or after the day ſuppoſed in the declaration, it is good enough, ſo as it be before the ſuit commenced. *Cro. El.* 53.

Aſſumpſit to deliver the priſoner into ſafe cuſtody.

The ſheriff having one in cuſtody, takes *Aſſumpſit* of *J. S.* to deliver the priſoner to the bailiff in ſafe cuſtody. This is a good *Aſſumpſit*, and no eſcape; for the court will not intend that the bailiff was abſent from the priſoner. *Sid.* 132.

Upon conſideration to permit him to ſtay in the houſe, *&c.*

In conſideration the plaintiff (who ſueth as bailiff) would permit *J. S.* taken in execution, to reſt in the houſe of *N.* till *Friday* next; if he eſcape, the defendant would pay the debt.

Good on mean proceſs. Action by the bailiff.

By *Hale:* The conſideration is good in mean proceſs, but being in execution, it is ill. But the action muſt be brought by the bailiff, or nobody; but conſideration to make a ſpecial bailiff is ſufficient to ſave harmleſs. This is no bond or promiſe taken of the priſoner, or of any for him; therefore it is not within

within the ſtatute. 2 *Keb. Rep.* 845. *pl.* 61. *Leon.* 132.

The bailiff aſſumes to ſave the ſheriff harmleſs of all eſcape, it is not good. The declaration is, that a *Ca' ſa'* on a judgment was awarded againſt the defendant to the ſheriff of *Suffolk*, who directed his warrant to the plaintiff, as his bailiff, to ſerve it; and that the plaintiff aſſumed to the ſheriff to ſave him harmleſs of all eſcapes, and that by force of the warrant he arreſted the defendant, and the defendant intending to make the plaintiff to be charged, eſcaped; for which the plaintiff, in the firſt action, brought an action againſt *J. C.* the ſheriff, upon this eſcape, and recovered, and *J. C.* brought this action on the *Aſſumpſit*. It was moved in arreſt of judgment, that there is no ſufficient cauſe in the declaration to maintain an action, for though the ſheriff may have action on the caſe againſt the priſoner that eſcapes, yet the bailiff ſhall not have it. *Per cur':* For the bailiff was not chargeable to the ſheriff by law, but by *Aſſumpſit*; and this being his voluntary act, ſhall be no cauſe to charge the defendant, but ſhall only make himſelf chargeable. But they agreed, if the bailiff had been chargeable by law, without ſuch promiſe, action lay for him againſt the defendant, who cauſed him to be charged. *Cro. Eliz.* 349.

Upon bailiff's promiſe to ſave the ſheriff harmleſs.

Defendant eſcaped.

Action againſt the ſheriff.

And by the ſheriff againſt the plaintiff.

Difference where bailiff is chargeable by law, and where by promiſe.

In conſideration he would permit him to go at large, and of 2*s.* paid, he promiſed to pay all the money in which the party was condemned in execution. *Per cur':* The conſideration is not good, being contrary to the ſtatute of 23 *H.* 6. and that a promiſe and obligation was all one; and though it be joined with another conſideration of 2*s.* yet being void, and againſt the ſtatute for part, it is void in all. *Cro. Eliz.* 199. *Plowd.* 62.

In conſideration of permitting, *&c.* and of 2*s.* *&c.*

Void in part, void in all.

Plantiff declared, whereas the defendant was arreſted at his ſuit on proceſs; the defendant, in conſideration that he ſhould be permitted to go at large, promiſed that he would appear at the day of the return, or would give him 10*l.* and he did not appear at the day. *Per cur':* It is a good *Aſſumpſit*, being made to the party which had authority to diſpenſe with

Where the promiſe was made to the plaintiff.

with his appearance. Had it been made to the ſheriff, or to any other to his uſe, it had been within the equity of the ſtatute of 23 *H.* 6. *Cro. El.* 190.

Priſoners. All that are priſoners are ſuch, either by matter of record, or matter in fact.

By matter of record. By matter of record, when one preſent in court is committed to priſon by the court, there if the gaoler has not him ready, it is an eſcape without more enquiry, (unleſs he had reaſonable excuſe) and the judges will ſet the fine preſently.

By matter in fact. By matter *en fait*, a man is a priſoner when he is arreſted by ſheriff, bailiff, conſtable, *&c.* and eſcapes, there the jury ought to find it, and preſent it before the juſtices, and the juſtices aſſeſs the fine.

Upon *Cap'* for felony. Upon a *Capias* for felony, the ſheriff returns *Capi corpus*, and hath not the body at the day, and the ſheriff was amerced for the eſcape at 50*l.*

Where ſuffering priſoner to eſcape. By ſome it is felony in the ſheriff to ſuffer a priſoner to eſcape. See ſtat. *De frang. priſonam.* If the gaoler ſuffer the eſcape, it is felony in him, and forfeiture of the office. 9 *Co.* 98.

Is felony. The ſtat. of 4 *Ed.* 1. *De frangentibus priſon'*, mitigates the rigour of the Common law; for before that ſtatute the breaking of the priſon was felony in every caſe: but now it is not felony, but where the party was committed to priſon for felony. 2 *Leon.* 161.

Indictment againſt a gaoler for an eſcape. *Fell*, keeper of *Newgate*, was indicted for the eſcape of *Berkinhead*, who was committed for high treaſon in conſpiring the death of the King. Upon Not guilty pleaded, verdict for the King. And now Sir *Batholomew Shower* and Mr. *Northey* moved in arreſt of judgment, that it was ſaid only that *Fell* ſuffered *Berkinhead* to eſcape, being in his cuſtody *oneratum pro alta proditione*, *&c.* and does not ſhew that he was committed for high treaſon to the cuſtody of the defendant. And for this exception judgment was arreſted. For by *Holt* Chief Juſtice, If a man be in cuſtody of *Fell* for a treſpaſs, and another perſon goes before a juſtice of peace, and ſwears high treaſon againſt him, he will be in cuſtody of *Fell*, and alſo charged with high treaſon; but yet, ſince he was not committed to *Fell* for high treaſon, *Fell* ſhall

ſhall not anſwer for his eſcape, as the eſcape of a man committed for high treaſon. The precedents are, *cujus ex cauſa commiſſus fuit*. And in the caſe for the eſcape of the Lord *Grey* the *Mittimus* was ſet out; and though error in the commitment will not excuſe the gaoler, (as if a man be committed for high treaſon, there to continue until further order) if he permits the man committed to eſcape, yet the gaoler ſhall never be charged for the eſcape of the man, as committed for an offence for which he never was committed to him. And he reprehended the King's counſel for not following the antient precedents. Another exception was, that it was ſaid, *Berkinhead* was committed *priſonæ de Newgate ſub cuſtodia vicecom'*. So that it did not appear that he was committed to the cuſtody of *Fell*; and alſo to ſay, that he was committed *priſonæ*, *&c.* was inſenſible, becauſe a man cannot be committed to a place, but to a perſon, *&c.* To the firſt point they held, that this was well enough: for if *Berkinhead* was committed to the ſheriff, and the gaoler permits him to eſcape, the gaoler is liable, for the priſoner is in the cuſtody of both. And though ſome ſcruple has been made whether the ſheriff be in ſuch caſe chargeable, [ſee *Hale P. C.* 114. the ſheriff ſhall not be charged criminally, *viz.* to extend to life or limb, though he is liable to payment of damages in eſcape for civil cauſe] without doubt he is. For by 14 *Ed.* 3. *c.* 10. the ſheriff ought to put in ſuch a gaoler as for whom he will be anſwerable; and by 19 *Hen.* 7. *c.* 10. which reſtores the gaols to the ſheriff, he ſhall be chargeable for eſcapes. And *Holt* ſaid, that he made mention of it for the good of ſheriffs, and not to cauſe examinations of what is paſt. And as to the ſecond part, *Holt* Chief Juſtice ſaid, that it was according to the precedents; for commitments *priſonæ et turri London* are frequent, and ſuch commitment is a good commitment to the lieutenant of the *Tower*. 3. A third exception was, that it did not appear (admitting *Berkinhead* to have been committed to the priſon for high treaſon) that he was under ſuch commitment at the time of the eſcape; for it may

Error in the commitment will not excuſe the gaoler for an eſcape.

Gaoler liable to eſcape, tho' the commitment was to the ſheriff.

The ſheriff puniſhable criminally for eſcape ſuffered by the gaoler.

Commitment to the priſon good.

may be he was pardoned, &c. But this was overruled, for *Holt* Chief Juſtice held, that that ought to come of the other ſide. And if a man was pardoned, yet the ſheriff ought not to take notice of it, until his pardon was allowed in the *King's Bench*, or ſome other court, for the ſheriff cannot allow the King's pardon; and it is criminal in him to permit a priſoner to eſcape before ſuch allowance had. Lord *Raym.* 424. *Salk.* 271. *pl.* 1. 5 *Mod.* 216. 12 *Mod.* 226. See 2 *Hawk. Pl. Cr.* 128 *to* 139. *chap.* 19, 20. and *H. H. P. C.* 591 *to* 606. *chap.* 51, 52. *Vin. Abr. tit.* Gaoler *and* Marſhal.

Priſoner pardoned eſcapes.

Eſcape warrants for retaking priſoners.

" If any perſon committed to the cuſtody of the marſhal of the *Queen's Bench*, or to the priſon of the *Fleet*, either in execution, or upon *meſne* proceſs, or upon any contempt in not performing any order or decree, by any of her Majeſty's courts at *Weſtminſter*, ſhall, before he ſhall have made payment or ſatisfaction to the plaintiff or creditors, or ſhall have cleared ſuch contempts, eſcape from the cuſtody of the marſhal, or from the priſon of the *Fleet*, or go at large; it ſhall be lawful, upon oath made before any of the judges of that court where ſuch action was entered, or where the party was committed, for ſuch judge to grant unto any perſon a warrant reciting the actions, executions or contempts, with which ſuch perſon eſcaping ſtood charged, at the ſuit of any perſon on whoſe behalf ſuch warrants ſhall be demanded, directed to all ſheriffs, mayors, bailiffs, conſtables, headboroughs and tithingmen, commanding them, in their reſpective counties and precincts, to retake ſuch perſon eſcaped, and ſuch perſons to convey to the common gaol where they ſhall be retaken, there to remain until they ſhall have made payment to the plaintiffs, or creditors in ſuch actions named, or until the judgments in ſuch executions ſued ſhall be reverſed, or until judgment in ſuch actions be given for ſuch perſons, or until the contempts for which ſuch perſons were committed be cleared, except ſuch perſons be charged with treaſon or felony, or on any other matter on behalf of the Queen: and if he, for any ſuch cauſe on behal

of

f the Queen, be removed to any other gaol, he ſhall e in ſuch gaol charged with all the cauſes with hich he ſhall be charged in the gaol from whence e ſhall be removed. And every mayor or other fficer, after delivery of ſuch priſoner, together with ch warrant to the ſheriff, ſhall take a note from ch ſheriff, teſtifying the receipt of ſuch priſoner; nd ſuch ſheriff, after the execution of ſuch warrant, all make a return thereof to the court where the ction ſhall be depending, or judgment or decree btained, which ſhall be filed." Stat. 1 *Ann. ſt.* . *c.* 6. *ſect.* 1.

Judge of either *K. B.* or *C. P.* may grant an eſcape warrant.

If a perſon charged in execution in the *King's Bench* be turned over to the *Fleet*, and he eſcape, ither a judge of the *King's Bench* or *Common Pleas* ay grant an eſcape warrant. 2 *Bac. Abr.* 245. *Mod.* 240. 10 *Vin. Abr.* 93. *pl.* 8.

Eſcape warrant does not lie againſt one committed for a contempt in *Chancery*.

A. was committed by *Chancery* for a contempt in eſcuing another taken on Lord Chancellor's warrant; was held, that *A.* not being ſelf-committed, but nly aſſiſting another who was committed, was not ithin the ſtatute, ſo as that an eſcape warrant ould lie againſt him, though it lay againſt the perſon reſcued by him. *Wms's Rep.* 439. 10 *Vin. Abr.* 1.

Eſcape warrant, where grantable.

Payne, the father, being in contempt in *Chancery* r non-payment of money, an order is made upon im. *Payne* the ſon reſiſts the ſervice, for which ontempt he is committed to the *Fleet*, and turns imſelf over to the *King's Bench*, and goes at large ill he is taken up by an eſcape warrant, and committed to *Newgate*. Now he moved for a *Superſedeas* o that eſcape warrant, the contempt not being ſuch n one as is within 1 *Ann. c.* 6. which ſpeaks only f contempts *for not performing an order*, which *Payne* he ſon was not obliged to do. *Et per curiam:* The father would have been within the act, but the on is not. This ſtatute is not to be extended by equity, becauſe it is againſt the liberty of the ſubect, and this is a new power given only in particular caſes; this is not one of them, and therefore not within the ſtatute: whereupon the warrant was ſu-

perſeded, and the marſhal directed to go to *Newgate* and take him into his cuſtody again, as was done in Sir *Thomas Tippin*'s caſe, *Stra.* 99.

Eſcape warrant illegally executed.

If one who is no officer, by virtue of the warrant ſeizes a perſon eſcaping, and brings him before the ſheriff, he cannot detain him; for being illegally executed, it is the ſame thing as if there had been no warrant at all. 6 *Mod.* 154. *Com. Rep.* 554. *Ld. Raym.* 309, 310, 353. 12 *Mod.* 31, 227, 230. 2 *Bac. Abr.* 245. 10 *Vin. Abr.* 92. *pl.* 6.

Eſcape warrant and day rule.

If a perſon is taken upon an eſcape warrant at eight in the morning, and the ſame day obtains a day rule, purſuant to a petition, which was not read in court till after eight, yet he ſhall be diſcharged; for as to this purpoſe there ſhall be no fraction of a day. 2 *Bac. Abr.* 245. 10 *Vin. Abr.* 92. *pl.* 7.

One who eſcapes with the privity of the gaoler cannot be retaken.

Defendant had been a priſoner in *Woodſtreet* compter in 1732, upon meſne proceſs at the ſuit of *Brown*, plaintiff's inteſtate, and being at that time a ſerjeant at mace, the *keeper of the compter ſuffered him to have the liberty of the gate*, (as it is called) that is, to have his liberty, *upon promiſe to return* into cuſtody *whenever called upon by the keeper*; the ſaid action having never been diſcharged upon the books of the compter, and *Brown* in his life-time having obtained judgment, the plaintiffs revived the ſame by *Scire facias*, and having obtained an award of execution, charged the defendant (ſtill a priſoner on the books) with a *Capias ad ſatisfaciendum*, as a priſoner in cuſtody of the ſheriffs of *London*; whereupon the keeper of the compter endeavoured to perſuade the defendant to return into cuſtody, which he refuſing, the keeper, on *Sunday* Nov. 9, *retook the defendant* at George's coffee-houſe, Temple Bar, *without any warrant*; and defendant moved againſt the keeper to be diſcharged, inſiſting that as the eſcape was voluntary, the keeper could not retake him, and alſo inſiſting, that the debt was paid to *Brown* in his life-time. The keeper, on ſhewing cauſe, could not controvert the firſt thing inſiſted on, *viz.* that the *eſcape was voluntary*; and as to payment of the debt, that was out of his knowledge: *Browne*'s action never was diſ-

diſcharged from the books, and the plaintiffs were not parties to this motion, but there had been a former motion this term by defendant to be diſcharged, the debt being paid; the plaintiffs had anſwered that fact, and ſhewn ſufficient cauſe to keep him in cuſtody. The eſcape on all hands being admitted to be voluntary, Mr. Juſtice *Denton* and Mr. Juſtice *Forteſcue* were of opinion, that the keeper could not retake the defendant, and that he ought to diſcharge him. Had the eſcape been real, the keeper might have retaken defendant on a *Sunday*, and is not reſtrained by the ſtatute 29 *Car.* 2. Mr. Juſtice *Reeve* was of the ſame opinion in point of law, but thought it too much for the court to relieve defendant, who appeared to have acted (at leaſt very diſhonourably with regard to the keeper), in this ſummary way upon motion, and that defendant ſhould be put to his action, or an *Audita querela*. Defendant was ordered to be diſcharged. 10 *Vin. Abr.* 93. *pl.* 7.

A priſoner eſcaped, and was retaken on a *Sunday* by virtue of a judge's warrant. The queſtion was, whether this taking was ſuch ſervice of proceſs as was againſt the act of 29 *Char.* 2. *chap.* 7.? By the whole court: This is a taking in nature of a freſh purſuit, and is no original proceſs, and the gaoler or party might have taken him upon a freſh purſuit on a *Sunday* before this ſtatute. 6 *Mod.* 95. 2 *Salk.* 626. *pl.* 7. 3 *Salk.* 149. *pl.* 1. *S. P.* 2 *Ld. Raym.* 1028.

How far the court will ſuperſede an eſcape warrant.

Motion that an eſcape warrant might be ſuperſeded, and that the defendant might be diſcharged out of cuſtody. It was ſaid, that the warrant was made out ſo long ago as in the year 1725, and the defendant was taken upon it laſt *October*, and that too by a common bailiff, who executed it without any other authority whatever. But it was obſerved, that an eſcape warrant, made out in the late Queen's time, was held to be of no force after her demiſe, for which reaſon the preſent writ likewiſe, that appears to have been made out in the time of *Geo.* 1. muſt have loſt its force likewiſe by his demiſe. It was likewiſe ſaid, that it was held, that a common bailiff

bailiff could not execute ſuch a warrant by virtue of the general words in it, without a particular authority. The Chief Juſtice ſaid likewiſe, that he remembered an eſcape warrant was ſuperſeded, that was executed after the time that the judge was out of his office that granted it. Accordingly the court made a rule, that the writ ſhould be ſuperſeded, and the defendant diſcharged, unleſs cauſe on the morrow. 2 *Barnard. K. B.* 78.

Eſcape warrant ſuperſeded, becauſe the party was intitled to be diſcharged at the time of the eſcape.

In *Michaelmas* term 6 *Geo.* the plaintiff brought his action, and the defendant put in bail, and in *Hilary* following iſſue was joined, and notice of trial given and countermanded, and the defendant was the ſame term ſurrendered in diſcharge of his bail. He lay by all *Eaſter* and *Trinity* term, and in the vacation made his eſcape, upon which the beginning of this term an eſcape warrant iſſued againſt him, which *Short* now moved to ſuperſede, becauſe the plaintiff having ſlept three terms, the defendant was intitled to be diſcharged upon common bail. This was oppoſed, becauſe he had been guilty of an eſcape, and therefore intitled to no favour, but he ought to lie till he has tried it by proviſo. *Et per curiam:* He is not indeed proper to pray a favour, but it would be hard he ſhould lie by till you think fit to try the cauſe; for it is not to be ſuppoſed one who cannot find bail ſhould be able to bring it on by proviſo. And beſides, as ſoon as he is taken upon the eſcape warrant, he will be intitled to his diſcharge by the rules of the court; ſo that to prevent the multiplying vexation and expence, we think proper to ſuperſede the warrant. *Stra.* 401.

Eſcape purged by return.

Per curiam: If a man eſcapes, and returns again, and after commits a ſecond eſcape, he cannot be taken up for the firſt eſcape, it being purged by his return. *Stra.* 423.

Gaoler cannot retake for fees.

Motion to diſcharge the defendant out of the cuſtody of the marſhal, the plaintiff in the action having ſent an order for his diſcharge. Upon a rule to ſhew cauſe, the marſhal inſiſted, that the defendant had broke the priſon, and let out himſelf and another priſoner, who was in execution for 500*l.* and that though the plaintiff's diſcharge came whilſt he

was

was out of prison, yet he had since retaken him for his fees, and had charged him in custody with a declaration for the escape of the other. But there being no case to warrant the gaoler retaking for fees, and the plaintiff in the action being satisfied, the court held the retaking to be illegal, and consequently the delivery of the declaration to him was void, and the marshal ought to discharge him. 2 *Vent.* 209. 2 *Barnard. K. B.* 20.

Rule obtained, that a person taken on an escape warrant, and committed to *Newgate*, might be redelivered to the marshal in execution, upon account of his having escaped upon a day rule. But now motion was made, that that rule might be discharged upon an affidavit, that he was not out upon a day rule when he did escape; and accordingly the court granted the motion. *Barnard. K. B.* 437.

When a person who has escaped is retaken, what prison he shall be committed to.

It is made a question, Whether an executor shall have an action on the case against the sheriff, for an escape in the time of the testator on mean process? But the better opinion seems to be, the executor cannot have any remedy; the escape being in the time of the testator, it is a personal wrong to the party, & *moritur cum persona*. 12 Mod. 71, 72. 1 Vin. Abr. 123. pl. 2. Poph. 189. Lat. 167. 170. 173. pl. 8. Noy 87. Salk. 12. pl. 2. Comb. 22.

That an executor on mean process may not have an escape.

But on the other side it was said by *Dodderidge*, the executor shall have this action, and that it is within the equity of the statute 4 *Ed.* 3. for it is a wrong, though upon mean process, and the tort continues as to the executor; for every thing which takes to the hindrance of the execution of a will, is a wrong to him, and the performance of wills is much favoured in law. And if this action would not lie, it would be a mischievous case; for as soon as the creditor dies, the gaoler may suffer the prisoner to escape, because none may have action against him.

Semble contra.

Two judges were against two.

Whitlocke's diversity was, This personal *Tort* may be considered in two respects; as a crime punishable,

Diversity.

and that is gone; or as a *Tort* to the party, and then it is but reaſonable that the executor ſhould have remedy.

That it well lies after judgment.

But it is agreed by all, according to *F. N. B.* 127. A. that if it were upon eſcape after judgment, that the action would lie by the executor; therefore *quere* as to 2 *Keb. Rep.* 616. *pl.* 64. The executor moved for a *Scire facias* againſt the defendant eſcaped out of execution in the time of the teſtator, and that the *Committitur* then entered may be vacated. *Per cur.* Albeit the party or the gaoler on negligent eſcape, or the party on wilful eſcape, may take him again, yet not by a new proceſs or *Capias* after a *Committitur* nor can the executors have any remedy.

No new proceſs after *Committitur*.

Debt by adminiſtrator.

The adminiſtrator may have action of debt against the ſheriff for the eſcape of a priſoner, ſuffered in the time of the inteſtate. But this was in the caſe of execution. *Styl.* 32.

Diverſity.

So that the difference ſeems to be where the eſcape is on mean proceſs, and where it is on an execution.

Diverſity between eſcape in the time of the teſtator, and the time of the executor.

Another difference is betwixt an eſcape in the life of the teſtator, and an eſcape in the time of the executor upon execution in the time of the teſtator. And it is agreed for law, that if a priſoner eſcape in the time of the executor, the executor may have action of debt.

It muſt be brought by executor in the *Detinet*.

The action ought to be on the *Detinet* only, for it is grounded on the former judgment. And as an action of *Debt* on the firſt judgment ſhall be in the *Detinet*, ſo here; and the difference was taken, where the action is grounded upon privity of contract, it ought to be in the *Detinet*. *Aliter*, when grounded upon a *Tort*. 2 *Danv. Abr.* 501. *pl.* 1. *Cro. J.* 545. *pl.* 5. *Hob.* 264.

So is the ſame caſe, *Hob.* 272. by the name of *Langeaſtel* and *Sidley*. If it were in the *Debet* and *Detinet*, the plaintiff ſhould recover for his own wrong.

So it is in *Sty. Rep.* 32. 2 *Rol. Rep.* 132.

So executor brings debt upon eſcape of one who was bail in the recognizance with, &c. to his teſtator, it muſt be in the *Detinet*. *Lane's Rep.* 80.

In debt for eſcape, brought by the executor; if he be nonſuit he ſhall not pay coſts. *Rol. Rep.* 63.

No coſts upon nonſuit.

The plaintiff brings action on the caſe as executor againſt the ſheriff (defendant) for eſcape, and had judgment given him *per nomen* of executor. This judgment paſſed by *Non ſum informatus*. Error was brought, becauſe the firſt judgment was given for him as adminiſtrator; and this in action on the eſcape, and the judgment on it was *per nomen* of executor.

Caſe and recovery as executor, upon a judgment given as adminiſtrator.

Dodderidge put the caſe.

The adminiſtrator hath one in execution for debt, the ſheriff ſuffers him to eſcape; he brought his action of *Debt* againſt the ſheriff for this eſcape, and recovers; and after all he finds a will by which he himſelf was made executor. The recovery ſhall now be good, and this money recovered againſt the ſheriff ſhall be aſſets in his hads, and no *Audita querela* in this caſe lies againſt the ſheriff. And *Brook* of the ſame opinion.

Adminiſtrator recovers in eſcape.

And afterwards finds a will.

Haughton contra. If the firſt executor dies inteſtate, his adminiſtrator ſhall not have an action of *Debt* againſt the ſheriff for this eſcape; no more ſhall the executor here in the principal caſe have his action againſt the ſheriff for the eſcape of him that was in execution at the ſuit of an adminiſtrator. The executor here hath no privity to ſue execution upon this judgment, becauſe the *Scire fac'* depends on the ſatisfaction, and to this he is not privy. The court being divided, it was compounded. 3 *Bulſt.* 12. *Cro. Jac.* 394. *pl.* 6. *Rol. Rep.* 276. *Godb.* 262. *pl.* 361.

That if firſt executor dies inteſtate, his adminiſtrator ſhall not have *Debt*.

Action on the caſe lies by commiſſioners of bankruptcy, for ſuffering one to eſcape who was committed by them, becauſe he refuſed to be examined. *Cal. Rep.* 47. *pl.* 16. *Mo.* 834. *pl.* 1123. 2 *Bulſtr.* 236. *Yelv.* 20. 2 *Stra.* 901.

Action lies by commiſſioners of bankrupts.

If the under-ſheriff takes one in execution, and ſuffers him to eſcape; action of *Debt* lies againſt the ſheriff himſelf.

Againſt the ſheriff.

The under-ſheriff ſuffered a priſoner to eſcape, and the action was brought againſt the under-ſheriff:

Againſt the under-ſheriff.

for (saith the book) it may be the sheriff himself had not notice of the matter: (*and I conceive it is no matter whether he had or not, he having security from his under-sheriff*). Leon. 146. pl. 203.

Where action lies against the under-sheriff or not.

If the under-sheriff lets one go that is arrested upon a *Latitat*, and returns *Non est inventus*; no action lies against the under-sheriff: but the sheriff shall not be imprisoned nor indicted for the act of the under-sheriff. *Lateh* 187.

Action against the bailiff of a franchise, and not against the sheriff.

Cap' ad satisfaciend' is awarded to the sheriff of *Berkshire* to arrest *J. S.* who was then in the custody of the mayor and burgesses of *Windsor*, and he awarded a warrant to the *Mayor*, &c. to take him, who did so, and after let him escape. Action of debt for this escape lies against them, not against the sheriff.

And the like law of a bailiff of a franchise.

Not against the executors of sheriffs or gaolers.

Action of debt is maintainable against a gaoler or sheriff for escape out of execution; but it doth not lie against his executors or administrators; see above, yet with this difference. *Dyer* 271, 322.

Difference between a *Tort* and levying money.

Where the sheriff is chargeable in his life-time for a personal *Tort* or *Misfeazance*, there his person is only chargeable, &c. *actio moritur cum persona*; but where he is chargeable for levying money on a *Fieri fac'*, and not paying it over, there if he dies, his executors are chargeable: it is a duty. *Cro. Car.* 539. *pl.* 3.

Against a serjeant in *London*.

A prisoner taken on mean process upon plaint before the sheriff in *London*, is in custody of a serjeant and escapes, the action shall be brought against the serjeant in this case. *Sid.* 318.

How if one of the sheriffs dies.

Action upon the case against the defendants being sheriff of *London*, on mean process, and after issue and trial by *Nisi prius*, and before the day *in banc* one of them dies; though they are reputed one officer, yet they are two distinct persons, and the suit shall proceed against the other. *Hardr.* 161.

By negligence. Voluntary.

If the party negligently escape, the party and the sheriff may take him again; but if voluntarily, then only the party may take him again, but not the sheriff.

By consent of plaintiff.

but if the sheriff let him go by the consent of the plaintiff

tiff, then neither can take him. 2 Keb. Rep. 206. pl. 43.

But though the party or gaoler on negligent escape, or the party on wilful escape may take him again, yet not by a new process or *Capias* after a *Committitur.* 2 *Keb. Rep.* 616. *pl.* 64. Not by new process.

If one in execution on *Ca. sa.* escape of his own wrong, yet the plaintiff cannot have other execution. *Hob.* 6. Upon a *Ca. sa.*

If a man taken in execution by a *Capias* be put in prison, and after escapes, and after the sheriff dies, a new *Capias* lies against him, otherwise the plaintiff would be without remedy. But if a man be in prison, and the marshal die, and then the prisoner escapes, there is no remedy but to take him again; for if after the death of the old sheriff, and before another is made sheriff, a prisoner go at large, this is no escape, for he is in custody of the law, and may be retaken in execution at any time. *Hob.* 60. *Mod. Rep.* 14. 3 *Co.* 72. In case of sheriff's death. In case of marshal's death.

On voluntary escape the party doth not lose his interest, but may take him again; and if the sheriff die, he may have a new execution, if he will. New execution.

So the plaintiff executor brought a *Sci. fac'* on a judgment in debt for the testator against the defendant, *Quare execution' habere non debet*; defendant pleads he was taken in execution *per Ca. sa.* upon this judgment and committed to the *Fleet*, and that the warden permitted him *ire ad largum.* Plaintiff demurs, and judgment given *pro querente*; and he may have new execution against the defendant, who escapes out of prison; by three justices, *contra Vaughan.* 2 *Jo.* 21. *Lev.* 211. *Sid.* 330. *pl.* 12. *Show. Rep.* 177. 2 *Mod.* 136. *Freem.* 213. *pl.* 220. Plea of *permisit ire ad largum.*

Second point, whether *permisit ire ad larg.* shall be implied *negligenter* or *voluntarie*, and it seems it is not voluntary, because the plea shall be most strongly taken against the pleader. *Negligenter.*

If *A.* be taken on execution at the suit of *B.* and *A.* voluntary escape by the assent of the sheriff, and after the sheriff retakes him and keeps him in prison, he shall be in execution to *B.* because though *B.* Where the party has election to charge the prisoner retaken, or the sheriff.

may bring an action againſt the ſheriff on this voluntary eſcape, yet this is at his election; for the party in execution of his own wrong ſhall not put *B.* to his action againſt the ſheriff againſt his will, and it may be that the ſheriff is not able to make him recompence. *Sid.* 350.

The execution muſt be effectual.

So it is ſaid, though the gaoler be liable to an action of treſpaſs for the retaking, yet the priſoner is in execution; and the reaſon given is, the body is a pledge, and the execution muſt be effectual. 3 *Keb. Rep.* 453. *pl.* 22, 463. *pl.* 39.

Voluntary eſcape not to be countenanced.

Voluntary eſcape ſuffered only to gain fees, ought not to be countenanced, nor is no plea in bar, that the party was intended to return to priſon again at his day; and the plaintiff has an intereſt, which is not diſcharged by the eſcape. But my Lord *Hobart*, on a trial at *Guildhall* in the ſheriff of *Eſſex*'s caſe, was of another opinion: the caſe was; The priſoner having been in execution, was willingly let go out of priſon by the gaoler, and then came into the gaol again, and ſo remained in the gaol till the time of another ſheriff, and then eſcaped, and an action of debt was brought againſt the ſheriff, and he directed the jury that the ſheriff was not anſwerable to this action; for when he was ſuffered by the gaoler voluntarily to go abroad, the execution was utterly diſcharged, ſo as he could not lawfully be taken again, nor adjudged in execution by law, though the party would yield himſelf to it, or the creditor ſhould allow it. 2 *Leon.* 162, 169.

This is ſince denied for law.

Eſcape with the gaoler's permiſſion.

If a priſoner in execution eſcape with the permiſſion of the gaoler, the execution is utterly gone and extinguiſhed, and the plaintiff ſhall never reſort to him that eſcapes, but ſhall hold himſelf to the gaoler for his remedy; *aliter* if he eſcapes voluntarily, or of his own wrong, *prout ſupra*, but the law is now held otherwiſe. But it is otherwiſe in caſe of a *Reſcous*. *Hob.* 202. 2 *Leon.* 117, 162.

Bar that he was formerly taken in execution.

In *Scire fac'* to have execution on a judgment in debt defendant pleads, that at another time the plaintiff had ſued execution by *Cap' ad ſatisfaciend'*, and the defendant was taken in execution. Plaintiff replies,

replies, that true it is, he ſued a *Capias ad ſatisfaciend'*, and the defendant was taken thereupon, but he preſently reſcued himſelf and eſcaped. *Per Cur'*: The replication is good, and it is no reaſon the defendant ſhould take advantage of his own wrong; though it is no good return upon a *Capias ad ſatisfaciend'*, that the defendant reſcued himſelf, nor any plea in debt on eſcape; and the plaintiff may have as well his remedy againſt the party as againſt the ſheriff, and the party hath liberty to begin again *de novo* by action on the judgment, or againſt the ſheriff. *Cro. Car.* 240. *pl.* 25. Replication by reſcous and eſcape.

If a man upon a *Capias ad ſatisfaciend'* be taken in execution, and after reſcues himſelf from the ſheriff, and eſcapes, the plaintiff may have a new *Capias* againſt him, and take him again; the firſt writ not being returned or filed, nor any record made of the award; and this on a *Sci. fac'* after the year, becauſe he ſhall not take advantage of his own wrong, and ſo he may have *Elegit*, or any other writ: and ſo it is if the ſheriff had returned the writ and *reſcous*, the plaintiff may have a new *Capias* againſt him. *Rol. Abr.* 904. New execution upon reſcous.

If one in execution eſcape, and the ſheriff makes *freſh purſuit* after him, and takes him again, although it be a long time after, yet he ſhall be ſaid to be in execution again, becauſe he ſhall not take advantage of his own wrong. *Mo.* 660. *pl.* 902. *Cro. El.* 439. *pl.* 55. *Poph.* 41. 3 *Co.* 52. *a. b. Gouldſb.* 18. *pl.* 114. Freſh ſuit.

Where one is taken lawfully in execution, and after diſcharged by writ of error, and after the judgment is affirmed, a new *Capias* lies not againſt him, but execution ſhall be awarded againſt his ſureties, if he will not render himſelf. But if the execution is reverſed, becauſe he was never lawfully taken in execution, (as if he be taken after the year without any *Sci' fac'*) he may be retaken again. *Latch* 292. When diſcharged by writ of error, &c. Execution againſt the ſureties.

Rule. *Debt upon eſcape ought always to purſue the firſt action.* Therefore where the plaintiff as executor brought debt againſt the ſheriff of *L.* on eſcape of *E. B.* againſt whom he recovered a debt of 82 *l.* Ought always to purſue the firſt action

as *administrator* of *J. S.* reciting all the record in certain, it is erroneous; for the first recovery was as administrator of *J. S.* and the debt on escape is as executor of *J. S.* which cannot be, that one should die intestate and have an executor. *Cro. Jac.* 394. *pl.* 6.

Against sheriff of *Devon* for an escape at *Exeter*.

The plaintiff declares against the sheriff of *Devon* for an escape at *Exeter*, which is a city and county of itself, and not part of the county of *Devon*, yet good after verdict; for it shall be intended the defendant had the custody of his prisoner in *Exon*, either by *Hab' corp'* or on *Fresh pursuit*. Sid. 364.

Declares he was in custody of both sheriffs, tho' the action is only against one.

The plaintiff declares, that the party was in custody of both the sheriffs of *London*, and the action is brought against one of them, the prisoner that escaped being in *Ludgate*, in the custody of the defendant only, the declaration is good; for the prisoner was in custody of both the sheriffs, though he was in the custody of the defendant; and it stands well enough with the record, and the words *Existen' in custod'* is a good averment that he was in custody; and the words *ut præfertur* do not hurt the averment. *Sty.* 297.

Averment.

Whether the sheriff shall take advantage of the insufficiency of the count.

Rule. *If the party in his declaration doth shew he has no cause of action, in such case, if the sheriff, by force of* Capias to him directed, doth take the party in execution, and suffer him to escape, no action of debt lies against the sheriff for this escape. But in *Dy.* 67. *a.* 2 *Bulstr.* 62. 9.

In action on escape against the sheriff or gaoler, they shall not take advantage of the insufficiency of the count, but shall answer to the escape. The same law is of an error in the record or discontinuance, because they are strangers to it, no more than a stranger shall falsify a recovery by matter dilatory. *Dy.* 67. *a.*

When the declaration ought to mention the first judgment.

Rule. *The declaration in escape ought to mention the first judgment*, or the plaintiff ought to shew he had recovered on judgment. And it is not sufficient to say, *quod recuperasset*. The case was, *quod cum* the plaintiff *recuperasset v.* J. S. *&c. prout patet per recordum*; and that upon this a *Capias* issued out, and

J. S.

J. S. was taken by the defendant, and escaped. It is too general, for *non constat* by the declaration that any judgment was ever given against him, and then he was not well taken in execution. *Saund.* 38, 39. *Lev.* 191, *Sid.* 305. *pl.* 14. *Saund.* 34. And though the sheriff be in contempt, if he let him escape, yet no debt ariseth, unless there were a judgment; and though it be said the sheriff took him in execution, and for debt, *unde convict' est*, yet this is but a recital of the writ.

No debt, unless there were a judgment.

Declaration in escape may be according to the writ, (*viz.* that he escaped out of the custody of the sheriff or bailiff.) This is in action on the case. *Sid.* 332.

May be according to the writ.

In case, declaration was, that the sheriff (the defendant) had arrested *L.* at the suit of the plaintiff by a *Lat'* sued out of the court the 21st of *January*, and that by the escape the plaintiff had lost his debt of 119*l.* Upon Not guilty, the jury find, that the writ was *Teste* 28th of *November*, but *revera* sued out of court the 21st of *June*, and that *Habeas corpus* was sued by the plaintiff returnable *mense Paschæ*, with intention to declare then against the said *L.* But the defendant, upon another writ of *Habeas corpus*, without the assent or notice of the plaintiff, sued and returnable *tres Paschæ*, *duxit* the said *L. ad respond'* to the plaintiff in trespass, *ac etiam billæ* of 19*l.* where the said *L.* was in custody of the defendant *ad respond'* the plaintiff *in billa de* 119*l.* and so the said *L.* was permitted to escape. Moved in arrest of judgment, because the action is founded upon an arrest at the suit of the plaintiff, by virtue of another writ than the writ found by the *Jury*; and the plaintiff might have declared otherwise, (*videl'*) that he had sued a *Lat' Teste* 28 *November*. But *per Cur'*: There is *Veritas Legis*, and *Veritas Facti*, and the declaration is according to the verity of the fact; and by necessity of law the *Teste* of the writ ought to be in term, as so is the course. Judgment *pro quer'*. 2 *Jo.* 149.

Declaration where *Veritas Facti* is found and agreed.

Though it be not shewn that the prisoner did not appear at the day, for if he did not appear, then the

Need not shew he did not appear at the day.

plaintiff was at no loſs; yet that is not error in the declaration, for though he did appear, yet the *Tort* is not purged. *Cro. Eliz.* 289. *pl.* 5.

That the defendant appeared by conſent.

Upon an action of eſcape upon mean proceſs, defendant pleaded, that after the time of the ſuppoſed eſcape, *H.* by conſent of the plaintiff, appeared at the day of the return of the writ, *Prout per Record apparet.* Repl. *Nul Tiel Record* of the appearance of *H.* by which it might appear, that he appeared by conſent of the plaintiff. Defendant demurred eſpecially, for that he put a double matter in iſſue, &c. *Lutw.* 73.

Repl. ill.

It was inſiſted for the defendant, that the replication was ill, becauſe the allegation of the appearance of the defendant was ſufficient; and the allegation over, that it was with conſent, &c. was immaterial, and that the plaintiff might have only traverſed the record of the appearance.

Plea ill.

But on the other ſide it was moved, that the bar was ill. *Hobart* 210. *Latch* 149. *Jo.* 138. 2 *Roll. Rep.* 119. But by conſent the parties amended.

Amendment.

Upon a return of *Cepi corpus & parat' habeo.*

A declaration is againſt a ſheriff, that he ſuffered his priſoner to eſcape, and had returned *Cepi corpus & paratum habeo*; whereas *revera* he had not the body at the return of the writ. *Quære* if this declaration was for the falſe return, or for the eſcape, or for both. To this declaration the defendant might have pleaded the ſtatute of 23 *Hen.* 6. but he demurred generally, and ſo has loſt the advantage of the ſtatute, which is a private ſtatute, and the defendant has confeſſed the eſcape by the demurrer. *Saund.* 154, 155.

Demurrer.

So that if the eſcape be well alledged, the court will not countenance error in other *Nonformalities.*

On eſcape.

The declaration was, whereas he had brought a writ of debt againſt *M. W.* and recovered, and ſhews all the matter of eſcape, &c. and then it is (as uſually in the *Common Bench*) *unde queritur quod cum* he brought a writ of debt againſt *M. W.* &c. and ſaith not the aforeſaid *M. W.* ſo it may be a ſtranger, and therefore not good. *Cro. Jac.* 188. *pl.* 5. But upon conference with the prothonotaries, it is the common

Undequeritur, &c.

mmon courſe in actions on the caſe after recital of e writ, in the *Unde queritur*, to begin *de novo*, and ot to ſay, *prædict'*, &c. And *per curiam:* Both ourſes are well enough.

Courſe of declaration *C. B.*

On *Non omittas*, *Capias*, and *Eſcape*. The *Capias* as of 50*l.* and to anſwer 5*l.* *Alano Lockhart*, pro-onotary. And the judgment in debt on the eſcape default is 50*l.* and this was aſſigned for error, r the judgment and *Capias* was but of 50*l.* as to e party. But *non allocatur*; for upon the whole e judgment is right, and but an error in fact, which nnot be aſſigned on the eſcape. 2 *Keb. Rep.* 646. 81. 2 *Saund.* 98.

Error in fact not to be aſſigned on the eſcape.

In eſcape againſt the marſhal, the plaintiff decla-ed, that whereas *J. S.* was indebted to him by ond, and thereupon arreſted by *Latitat* and put in ail, and the plaintiff obtained a judgment; who hereupon, in diſcharge of his bail, did render him-lf to Sir *John Lenthall* in execution, and afterwards ir *John Lenthall* (the marſhal) ſuffered him to eſ-ape. To this it was excepted, that he rendered imſelf to the marſhal; whereas he ought to ſay, he endered himſelf to the court, for it is the act of the ourt that turns him over to the *Marſhalſea*, and a udge can only take and diſcharge the bail. But it s ſaid here, that he rendered himſelf to Sir *John enthall* in court, which is well enough. *Sty.* 330.

Againſt the marſhal upon a ſurrender in court.

The declaration was, that he was in execution of he old ſheriff, and delivered to the new ſheriff, and hen committed to the marſhal by *Habeas corpus*, nd then ſuffered to eſcape. *Cro. Jac.* 587. *pl.* 11.

Declaration as to the old and new ſheriff.

This exception was taken to the declaration, be-cauſe it was not ſhewed that the antient ſheriffs de-livered him in execution, with the cauſes of impri-ſonment, to the new ſheriffs; for otherwiſe it is an eſcape in them, and not in the marſhal; for it may e he was delivered *per indenturam debito modo confec-tam* for other cauſes, and this cauſe was not men-tioned. And a declaration ought to be certain to every intent; and though it be ſaid, *Virtute cujus* he was in execution under the new ſheriffs, yet that does not help it, for it is but the concluſion of the premiſſes;

It muſt be ſhewed that the old ſheriff delivered him *cum cauſa* to the new ſheriff.

Virtute cujus, &c.

premiſſes; and if the matter before does not ſhew h
was in execution, that *Prætextu cujus* will not ſerv

In debt on eſcape. The original and *Capias*, whic
was returnable *Craſt. Martin'* in *Michael'* 16
was ſet forth, and that *Sydly in exit' ab officio*
December, after the return delivered him over
G. and it appears not that the priſoner was ever
the cuſtody of *Sydly*. But by *Windham*, he cou
not elſe be turned over; and it is expreſsly ſaid he w
in cuſtody, and it may be, no writ was returned
the ſheriff; and though in law he cannot be in cu
tody till the return, yet that ſhall be now intende
Neither need it be ſaid, that the ſheriff was conti
nued in his office above a year. *Keb. Rep.* 67
pl. 119.

Declaring on eſcape on outlawry.

One was outlawed by the plaintiff, and by *Habe
corpus* he was delivered to the *Marſhalſea*, and eſca
ped. Now the declaration may be for the party on
ly, and it need not be an action on the caſe *in
quam*, though here is a contempt to the King. *Brid
Rep.* 8.

Caſe, not debt.

The plaintiff in debt on *Eſcape* declares of a re
covery on 13, outlawed 15, and that he was take
up by a *Cap' utlagat'* 18 *Car.* 2. after the year, an
doth not declare that he was in cuſtody, nor that
was even charged in execution at the ſuit of t
party, by prayer on the firſt judgment, (in whi
caſe, though an action on the caſe will lie, yet no
action of debt.)

Taking after the year.

And after verdict *pro quer'*, *Maynard* moved i
arreſt of judgment, that this taking after the yea
after the recovery and judgment on the outlawry
does not make the priſoner in execution at the ſu
of the party, without prayer; becauſe it may
intended, that the party intended to have other e
ecution than the body. And relied on 5 *Co.* 8
that until election made, he is not in at the ſuit
the party. *Sid.* 380. *pl.* 11. 2 *Keb. Rep.* 40
pl. 30.

Election.

Though the *Capias utlagat'* be after the year, yet debt lies upon eſcape.

But upon *Cro. El.* 850. *Shaw* and *Cutler's* ca
and 706. *Leighton* and *Garnon's* caſe, the court in
clined, that though the *Capias* be after the year, y
de

debt lies againſt the ſheriff for the eſcape, without any prayer of the party entered on record; and that he which is taken upon a *Cap' utlagat'* is in execution at the ſuit of the party, till the party diſclaim it. 5 *Co.* 89.

So action on eſcape on mean proceſs in inferior courts, by virtue whereof the defendants, as bailiffs, did duly arreſt him, and they ſet not forth any plaint. And *per Cur'*: This is but inducement, and cured by appearance, the *Eſcape* being well ſet forth. 2 *Roll. Rep.* 209. *pl.* 11. Need not ſet forth any plaint in inferior court.

In action on the caſe for *Eſcape*, it was alledged in the declaration, that the ſheriff directed his warrant to the bailiff of a franchiſe to arreſt the party, who arreſted him, and delivered him to the under-ſheriff *in ea parte authoriz'*, &c. and ſhewed no place where the bailiff delivered the priſoner; for it may be, it was out of the county. *Sed non allocatur*; for the ſhewing the place was but inducement to the action; and when he pleaded Not guilty, the *Eſcape* is the matter material. *Cro. Eliz.* 289. *pl.* 5. Bailiff of a franchiſe delivered the perſon arreſted to the ſheriff, and ſaith not at what place.

Debt upon *Eſcape* was brought againſt the bailiff of a liberty, and it was excepted to the declaration, that it was not alledged the ſheriff made a warrant to the bailiff on execution, but only that *A.* aforeſaid, by virtue of the warrant aforeſaid, took the priſoner, and ſaith not within the liberty aforeſaid. *Sed non allocatur*. It is not alledged that the ſheriff made warrant to the bailiff of a liberty.

Action on the caſe on *Eſcape* brought, and the plaintiff declares, that the party was in execution at the ſuit of the teſtator; it is good without ſaying, *profert in curia* of the will. *Rol. Rep.* 78. *Profert in curia* of the will.

Baron and *Feme* brought *Eſcape*; the *Baron* arreſts the priſoner with a *Latitat* in his own name ſole. And now he declares, that he took out the *Latitat* *ea intentione* to diſcharge the priſoner, upon a bond made to the wife *dum ſola fuit*; and by three juſtices, it is good. Eſcape brought by *Baron* and *Feme*.

Action on the caſe againſt a bailiff of a liberty on an *Eſcape* by a clerk of the *Hanaper* in *Chancery*; and declares, that for recovery of his debt he proſecuted an attachment of *Privilege*, directed to the ſheriff Upon attachment of privilege.

sheriff of *Middlesex, ad respond' placito transf. ea intentione*, that he should put in bail for recovery of his debt on bond; the sheriffs of *Middlesex* directed their warrant to the bailiff of *Westminster*, and he arrested him, and suffered him to escape. *Cro. Car.* 329.

Declaration ill.

The declaration is naught;

1. Because he doth not say of what liberty he was bailiff, or whether he hath execution or return of writs.

2. He alledges he had an attachment of *Privilege* to arrest him in *Trespass*, intending after his appearance to declare in *debt*, which cannot be, unless in *B. R.*

The reason of declaring in debt on *Trespass* in *B. R.*

And there the reason is, because when he appears and puts in bail, he is supposed to be *in custodia mareschall'*, &c. and declares against him in custody; but it is not so in any other court.

Sheriff's action against the escaper.

Upon a voluntary *Escape*, the sheriff shall not have an action on the case against the prisoner. *Aliter* upon a negligent *Escape*. *Mo.* 597.

Sheriffs of *N.* bring action on the case, and declare,

Whereas *J. S.* recovered against the defendant in debt of, &c. and a *Cap' ad satisfaciend'* was awarded against him, by force whereof they directed their warrant to three serjeants, &c. to arrest him, who did arrest him 26 *Febr.* &c. and he escaped, and afterwards was not found in the same county, *per quod* by reason of the same *Escape* they were bound to answer the debt *ad dampnum*, &c.

The jury, on Not guilty, found that he was arrested about the 26th of *Febr.* and to this declaration it was excepted,

By warrant, and not said *sub sigillo*.

1. They alledged they made a certain warrant, and say not *sub sigillo sigillat'*, and a warrant without a seal is insufficient. *Per cur':* It is the usual form, and they do not usually say, *sub sigillo*, &c.

2. They say, they are chargeable with the debt, but say not that they were charged or damnified; and if they be not damnified, they have no cause of action: for perhaps the party will never sue them,

or

r they may die before ſuit, and then the ſuit is one.

But *per cur'*: Action lies in the eſcape before they re ſued, for the party arreſted did a wrong to them by the eſcape and reſcous, and they are always chargeable to the other party; and if they ſtay till they are ſued, perhaps the party that eſcaped may lie, or fly the country. Sheriff may have the action before he is ſued.

3. The arreſt and reſcue is ſuppoſed the 26th of *February*, which is uncertain whether it were before or after that day; and if it were after that day, it will not maintain the declaration, for then it cannot be a reſcue the 26th day. Jury find the reſcue *circa*, &c.

But *per cur'*: The verdict is good before or after the day, ſo as it was before the ſuit commenced. *Cro. El.* 53. *pl.* 3. Verdict good before or after the day.

If judgment be given in debt againſt the ſheriff on *Eſcape*, he ſhall have an action on the caſe againſt the party that eſcapes, although the gaoler licenſeth him to eſcape, and he ſhall not plead this licence. *Mo.* 404. *pl.* 541. Upon an eſcape by licence.

Sheriff of *London* brought action upon the caſe againſt *Pain*, becauſe that he being in execution under their cuſtody at *Spicer*'s ſuit, made *Eſcape*, &c. The defendant confeſſed all the matter, but further pleaded, that after the *Eſcape*, *Spicer* had acknowledged ſatisfaction, (being after the *Eſcape*) upon record of the ſum recovered; demurrer. Action lies, tho' plaintiff had afterwards acknowledged ſatisfaction.

Per cur': The action is maintainable, though the plaintiff in the firſt action had acknowledged ſatisfaction, the payment after doth not take away the action, but mitigates the damage only; for the act of a third perſon ſhall not take away the action once veſted. *Leon.* 237. *pl.* 321. Damages mitigated.

Fitz. N. B. 130. *b.* It is ſaid there, the plaintiffs in this action ought to ſhew, that they had been impleaded by him who recovered; for they cannot have this action before they are ſued. *Qu.* Q. if they ought to ſhew they were impleaded.

CHAP.

CHAP. XVI.

False Imprisonment.

Arrest after the writ returned.

IF a bailiff arrests one after the writ is returned, false imprisonment lies.

Precept from illegal court.

A precept to arrest from an illegal court will not save the officer from an action of *false imprisonment*. *Heb.* 61.

Erroneous process.

Trespass, *&c.* will not lie against the sheriff for executing process, though it were erroneous. *Heb.* 48.

Arrest by a wrong name.

One asks another if his name be *J. S.*? who said, Yes; on which he arrests him by a warrant which he had to arrest *J. S.* yet *false imprisonment* lies. *Mo.* 457. *pl.* 629.

Arrest after *Supersedeas.*

One had a *Capias ad satisfaciendum* delivered to the sheriff, who made a warrant to his bailiff to do execution; afterwards a *Supersedeas* was awarded and delivered by the sheriffs to the defendant, being his bailiff, who escaped, and the defendant retook him and detained him in execution. This second is *false imprisonment*, for though the first imprisonment was legal, he having taken him by virtue of a warrant made before the *Supersedeas* awarded and delivered, he not having notice of *Supersedeas*, was excusable. But the detainment in prison was afterwards a wrong, for he being the sheriff's servant, and by intendment having time given him sufficient to take notice from his master, ought at his peril to take notice thereof. *Cro. El.* 918. *pl.* 10. *Mo.* 677. *pl.* 921.

An action of *false imprisonment* will not lie against a sheriff or gaoler for taking the body by virtue of a *Capias ad satisfac'*, upon an erroneous judgment, for the execution is good till avoided by writ of error. 3 *Mod.* 325.

The liberty of a man is so tender in the eye of the law, that a small thing amounts to false imprisonment. As in a case tried at *York* assizes, one *Robert's* case.

One

One in execution in the county of *Lancaster* desired to be brought to the county of *York* to speak to his friends, and being there, endeavoured to make his escape; and the defendant commanded to stay him. He was held a principal imprisoner, as well as those that laid Hands on him. The defendant pleaded *Not guilty*. Otherwise had it been, had he pleaded specially, *(viz.)* that the prisoner was brought into another county at his own desire. But the jury honestly gave but two-pence damage. *Robert*'s case at *York* assizes.

One in execution in *com. L.* prevailed to be carried into the county of *Y.* and there the defendant stayed him, *&c.*

If a man be in the hands of the under-sheriff in execution for debt, and the debtee tells the sheriff that the prisoner has satisfied him; if the sheriff release not the prisoner, it is false imprisonment to detain one after the plaintiff hath commanded the sheriff to deliver him. *Cro. Jac.* 379. 3 *Bulstr.* 96. *Rol. Rep.* 240. *pl.* 10.

Sheriff detains the prisoner after notice of the debt paid.

A. is in execution at the suit of *B.* afterwards *B.* came to the sheriff, and told him he had made and sealed a release of the debt to the plaintiff, and that therefore he should deliver him out of execution. The sheriff doth not so, but after keeps him still in prison. The plaintiff brings action of false imprisonment. It lies.

Plaintiff tells the sheriff he had made a release.

By stat. 1 *R.* 2. *c.* 12. one being in execution shall not be suffered to go out of prison by mainprise, bail, or baston, without making gree to the parties, unless it be by writ or other commandment of the King; and the detaining him after this amounts in law to a new taking: for the restraining of his liberty, where he ought to have it, is a caption in law. Here the sheriff ought to take notice of the party-plaintiff, and at whose suit he is in custody.

Stat. 1 *R.* 2. *c.* 12.

Sheriff ought to take notice from the plaintiff.

By *Coke*, detainer after this, by the space of one hour, is false imprisonment: (a continuance of an injosure is a new nusance.) If he would have helped himself here, he ought to have set forth that he knew him not to be the plaintiff, who told him of the release. 3 *Bulstr.* 96, 97. The case of 20 *H.* 7. 19. differs from this case, because the debt of the King

Detainer afterwards is false imprisonment.

was satisfied. *Rol. Rep.* 240. *pl.* 10. *Cro. Jac.* 379.

Party who shewed the goods, a trespasser.

The party who went with the sheriff to shew to him where the goods were (in execution), the judgment being set aside afterwards, was a trespasser *ab initio*; but that the sheriff was not suable nor chargeable. 2 *Sid.* 125. See 1 *Sid.* 272. *Lev.* 95. *T. Raym.* 73.

Where action against him that levied a plaint wrongfully, &c.

If one be arrested by process out of an inferior court, for a cause of action which does not arise within their jurisdiction, the party-plaintiff may well maintain his action against him that levied the plaint, or the officer who had executed it. 2 *Jo.* 214. 2 *Show. Rep.* 148. *pl.* 131. 204. *pl.* 214. *Lutw.* 1568. *Skin.* 49. *T. Raym.* 421, 467.

Pleadings.

Justification at the time of the arrest.

If a sheriff justify by force of a *Capias* to him directed, he shall say he was sheriff at the time of the arrest, as well as at the receipt of the writ. 35 *H.* 6. 48, 49.

De son tort demesne.

In trespass, where one justifies as an officer to do execution, *De son tort demesne*, without answering to the cause, is no plea. 19 *H.* 6. 7. *a.*

In false imprisonment, the defendant may shew twenty causes by way of justification, and it is not double. 7 *Ed.* 4. 20. *Plowd. Com.* 86. *a.*

Return of the writ.

Where the sheriff justifies by execution, he must plead that he returned the writ; *secus* of a bailiff. *Leon.* 144. *pl.* 20. *Cro. Eliz.* 181. *pl.* 16.

Warrant.

If a bailiff justify by force of a warrant, he need not say, *hic in cur' prolat'*, for the warrant doth not continue in his hands, but he returns it to the sheriff. *Rol. Rep.* 327.

On irregular proceedings in a court.

Though the proceedings in a court be irregular, yet if the court has power to issue out a *Capias*, by this warrant the officer may justify in false imprisonment. *Mod. Rep.* 173.

Warrant.

If a bailiff justify by reason of a warrant, he ought to shew the place where the warrant was made. It sufficeth if it be shewed in the rejoinder. 5 *H.* 7. 24. *Long* 5 *to* 101. *b.*

Justification. The immediate officer must shew the process returned.

The sheriff ought to return his writ, otherwise his justification is not good; but it is so with the servant

Fal-

False imprisonment was brought against the sheriff's bailiff; he justifies by the sheriff's warrant or *Latitat*, who arrested the plaintiff, and required the defendant to be aiding to him; but pleads not that the writ being returned, was executed. Yet *per cur'*, it is good, for the defendant has no means to reinforce the sheriff to make return thereof. *Cro. Car.* 446. *pl.* 11.

Aliter of the bailiff.

In action of false imprisonment, the defendant justified by process to the bailiff out of the court of the honour of *P.* and does not shew any process was returned, which being an immediate officer, must be shewed: *contra* of an under-officer. And although he need not shew forth the letters patents, yet it must be specially pleaded such a court was granted, and that *virtute*, &c. 2 Keb. Rep. 293. pl. 77.

By process out of an inferiour court.

If the defendant, in justification of an arrest, pleads that a bill of *Middlesex* was prosecuted against the plaintiff, by which the sheriff made and directed a warrant to arrest him; it shall be intended that the bill was delivered to the sheriff before the making of the warrant, till it be specially shewed to the contrary. In this case he justifies by writ to the sheriff, and warrant to himself. *Saund.* 299.

When bill of *Middlesex* shall be intended to be delivered.

The causes of demurrer were, because it is not shewed the writ was delivered to the sheriff, nor the warrant made before the arrest; and also for that it is not averred that the writ was returned. But *non allocatur:* This is no essential matter, nor traversable; and the plaintiff might have replied, that the arrest was before the delivery of the writ, else the court will intend it to be delivered, being said that *virtute* of a writ directed to the sheriff, and warrant, the defendant arrested; and the writ needs not be returned by a bailiff errant. 2 *Keb. Rep.* 607. *pl.* 41. 838. *pl.* 70. 844. *pl.* 81.

Demurrer for not shewing delivery and warrant before arrest.

So in *Scire fac'* on recovery in action on the case; the defendant pleads, no *Capias* issued out against *H.* delivered to the sheriff. Plaintiff replies, a *Capias* issued out, and *Non est inventus* returned; but says nothing of the delivery to the sheriff. Defendant demurs, and judgment *pro quer'*, for delivery to the

Delivery of *Capias* to the sheriff shall be intended.

sheriff shall be intended. 3 *Keb. Rep.* 668. *pl.* 47.

Molliter manus impoſuit.

Note; Upon a demurrer to a replication in assault and battery and *Faux impriſonment*, defendants justify by a precept to arrest, *&c.* The principal exception to the plea was, that the justification of an arrest by *Molliter manus impoſuer'*, was not any justification of the battery; and the case of *Stoney* and *Calvert* was cited, *Hil.* 3 *W. & M.* which upon a demurrer was adjudged accordingly by the whole court. 2 *Lutw.* 929.

As to the time of the taking out the writ actually, and the *Teſte* of it.

The time when a *Latitat* issued forth is traversable, and may be averred otherwise than according to the *Teſte*; *per totam curiam*; for a relation shall not work a wrong. 2 *Keb. Rep.* 173. *pl.* 56. 198. *pl.* 25.

If a man be taken in vacation by a warrant without a writ, and a *Latitat* be procured, *Teſte* in the term, that *Teſte* shall not discharge the wrong done after the *Teſte*, and before the actual taking out of the writ; but the plaintiff may take issue that he prosecuted truly. But in trespass and false imprisonment, the defendant, as sheriff's bailiff, justified by a *Latitat*, *Teſte* 27 *June*, *Trin. term* past.

Writ after the arrest,

The plaintiff replies, that the said writ was really and actually prosecuted out of *B. R.* on the 9th of *August*, which was after the arrest of the plaintiff.

Shall not prejudice an under-bailiff.

Defendant demurs. And *per cur'*: This is an estoppel, especially in case of a bailiff, whose warrant might be before the arrest; and all writs must be *Teſte* as of the term, and the sheriff's not returning the writ, or the not having any, shall not prejudice his under-bailiff.

But action against sheriff.

But *per curiam*: A good action will lie against the sheriff or bailiff of a franchise in this case.

But in *Plunket* and *Green*'s case in the same reporter,

E contra.

In trespass and false imprisonment against the sheriff and bailiff, the defendant justified by warrant of writ to the sheriff, as *Long* and *Bolton*'s case. The plaintiff replies, No writ was then taken out. Defendant demurs, and judgment *pro quer'*; for though

the bailiff hath a warrant, yet he is liable if there be no writ. *Contra*, if the writ be void and delivered. 2 *Keb. Rep.* 705. *pl.* 69.

Warrant and no writ.

Trespass and false imprisonment, the defendant justifies by arrest on *Latitat*. Plaintiff replies, The writ was taken out after the arrest. Defendant demurs. *Per cur'*: The antedate of the writ will not suffice, if the proceeding be after. And judgment *pro quer'*. 3 *Keb. Rep.* 213. *pl.* 21.

Antedate will not suffice.

And as to pleading as to the time, *Richardson* and *Prickett*'s case is to be observed. The plaintiff supposed the arrest and imprisonment to be 10 *Decem.* 29th *Eliz.* Defendant pleads, by virtue of a warrant from the sheriff he did arrest and imprison him the second and third day of *December* before; *absque hoc* that he was guilty before or after, *&c.* Plaintiff replies, He was guilty of the trespass, *&c.* after the third day of *December*, *prout in narratione sua specificatur*, and issue upon this, and well enough; though he saith, only he was guilty after the third day: but saith not, and before the action brought. For when it is said, he was guilty after the third day, *&c. prout*, *&c.* it is to be intended to be the third day, and the day of which he counted. *Cro. Eliz.* 95. *pl.* 6.

Traverse that he was guilty before or after, *&c.*

Replication that he was guilty after.

To all the imprisonment, but eleven hours, the defendant pleads *Not guilty*; and to the imprisonment for eleven hours he justifies as sheriff, for that the plaintiff hindered him in the execution of his office, and said nothing to the *Vi & armis*, yet good. *Saund.* 78. But this case went farther, 2 *Keb.* 237. The trespass and false imprisonment was laid the first of *April*; the defendant justifies at another day at *Warw.* as sheriff, *absque hoc* that he was guilty the first of *April*, or at any time before or after, while he was sheriff, or at any other place. *Per cur'*: This traverse is sufficient, and the plaintiff must reply and shew if there were any other assault or imprisonment. Also the traversing the time before and after doth not lock up the plaintiff from assigning another day and place, especially the thing being local. *Saund.* 78. 2 *Keb. Rep.* 237. *pl.* 13.

Non culp. to part, and justifies as sheriff for the residue, without saying to the *Vi et armis*.

Traverse of the time and place.

Time, *quæ est eadem transgressio.*

Justification in false imprisonment by a writ of *Supplicavit de bono gestu* out of *Chancery*, and arresting him by the sheriff's warrant thereupon. The justification being by an act in the same county, and justifying all the time in the declaration, though it do not agree with it in the day, but concludes, *quæ est eadem transgressio*, is good enough, the day not being material; and the replication is not good, if it vary from the day in the declaration. *Cro. Car.* 228. *pl.* 6.

The case.

The case was, Trespass, *&c. ultimo die Octob.* 6 *Car.* and detaining him in prison for two days. Defendant justifies, because 13 *Aug.* 6 *Car.* a writ of *Supplicavit* issued, and by warrant from the sheriff to the defendant, he arrested the plaintiff 21 *Sept.* and detained him two days, *&c. quæ est eadem transgressio, &c.*

Place, *quæ est eadem transgressio.*

In false imprisonment in *London* versus *W.* defendant justifies in *Norfolk*, by force of a warrant to the sheriff, *quæ est eadem transgressio, absque hoc* that he is guilty in *London*. Plaintiff demurs generally.

Traverse double.

1. Because the plea is double; for the justification in *Norfolk*, *quæ est eadem transgressio*, had been sufficient without more, and then the traverse makes it double. But *per cur'*: You shall not take advantage of this upon a general demurrer. *Rol. Rep.* 221. *pl.* 26. *Cro. Jac.* 372. *pl.* 1.

General demurrer.

Warrant *hic in cur' prolat'.*

2. He justifies by warrant, and saith not, *hic in curia prolat'. Per cur'*: They need not shew this to be in court, for it appears to be executed, and that the warrant is returned to the sheriff. And so for this last point is *Rol. Rep.* 327.

Trespass in *London*, justification in *com' N.*

Trespass in *London*. Defendant justifies by a warrant in the county of *N. quæ est eadem transgres. &c.* and traverseth, that he is guilty in *London*, *vel alibi extra com' N.* and good. *Cro. Jac.* 372.

Where *Quæ est eadem* is not necessary.

If the defendant in trespass justify the same day and place, it is not necessary to say, *quæ est eadem &c.* Bulstr. 138. Keb. 27, 29.

Upon false imprisonment, defendant pleads plaintiff's consent.

False imprisonment by a woman. The defendant saith, that she was carried to *Southwark* by her consent, which is the same imprisonment; and this is no

no plea, for imprisonment is against the will of one, and that is not so. 14 *H.* 6. 2.

So in assault, battery, and wounding; the defendant saith, that he laid his hands upon the plaintiff peaceably, and arrested the plaintiff the same day, which is the same assault, battery, and wounding; and held it was no plea for the reason aforesaid. 21 *H.* 7. 49. That *Molliter manus imposuit*, and arrested him.

Yet in false imprisonment, the defendant justifies as sheriff, that he arrested the plaintiff by a *Capias*; and it is good, if he say, It is the same trespass, otherwise not. 22 *E.* 4. *Bro. False Imprisonment* 29. That he arrested him by a *Capias*, *quæ est eadem.*

In false imprisonment, the defendant justifies (as sheriff) the taking the plaintiff by force of a *Capias* directed to him at *D.* within his county of *G.* where the plaintiff declares of an imprisonment in another county, there the traverse of the county is good; for the defendant cannot take the plaintiff, by force of the said process, in any other county than where he is sheriff: and so the justification is local. 3 *Leon.* 97 in *Partridge* and *Pool*'s case. Justification local.

The defendant justifies the arrest *quousque* bond given to appear in *B. R. absque hoc* that at any time he did arrest without reasonable cause, until he gave such bond. Plaintiff demurs generally. *Per cur'*: The justification is good, and the plaintiff should have traversed, *absque hoc* that he was arrested, and detained till obligation to appear in *B. R.* 3 *Keb. Rep.* 165. *pl.* 42. Justification. Traverse.

False imprisonment. Defendant justifies by arrest, by virtue of a warrant of the sheriff on a *Latitat*. The plaintiff replies, *De injuria sua propria absque tali causa*. This is naught upon demurrer, being matter of record; but issue being taken upon it, and being in the affirmative, it is a *Jeofail*, and good after verdict. Judgment *pro quer'*. Keb. Rep. 125. pl. 37. 164. pl. 115. *De injuria sua propria* to a justification by virtue of a *Latitat* and warrant.

The defendant justified by a writ sued out of *B. R.* to *vic' Devon'*, and warrant and arrest thereupon at *D. &c.* Replication, *De injuria, &c. absque tali causa*. Defendant demurred generally, and judgment for him; for it is ill upon a general demurrer to put the Matter of record, *&c.* put into one issue, ill.

matter of record and fact, and variety of matters, in one issue, as the warrant, arrest, &c. 3 *Lev.* 65.

The defendant justifies in false imprisonment, because a writ of *Vi laica removenda* came to the sheriff to remove the force. The plea need not say, they found him *resistentem in ea parte.*

Execution must plead return of the writ.

Where the sheriff justifies by execution, he must plead, that he returned the writ; *secus* of a bailiff. *Leon.* 134. *pl.* 20.

In trover of 300 sheep, 1 *Dec.* 36 *El.* defendant pleads, that he was sheriff of *com' Linc'*, and that *J. S.* recovered against the plaintiff 100*l.* and upon that a *Fieri facias*, which writ was returnable *Crast' in' Animar'*, 35 *El.* that this was delivered to him 1 *Oct.* 36 *El.* that he on the 20th of *Oct.* took the said 300 sheep, and on the 22d of *Oct.* sold 104 sheep for 40*l.* and that the other 196 sheep remained *pro defectu emptorum*; and at the same day of *Crast' in' Animar'* he returned the said writ, and all this matter, the which is the same conversion, *absque hoc* that he converted them *aliter vel alio modo. Per cur':* The plea is insufficient.

But no conversion confessed.

1. Because by his plea he doth not confess any conversion, and then the traverse is ill. He ought upon this matter to have pleaded *Not guilty*, and given it in evidence.

How this traverse extends.

2. Because the declaration supposeth the trover and conversion to be the first of *December*, 36 *El.* and he justifies the conversion in *Octob.* 35 *El.* so he meets not with the plaintiff in time, and therefore he ought to have traversed, and the traverse *aliter vel alio modo* shall never answer to the time, but to the manner of the conversion.

3. He makes not any justification for four of the sheep, but that he seized them; but he shews not what he did with them. *Cro. El.* 433.

Justification to prevent rescuing of goods.

In an action of battery, the defendant justifies by command of the bailiffs, to prevent rescuing goods seized on execution. Replication, *De injur' sua propr'*, and traverses the command of the bailiffs. Defendant demurs generally. Resolved that the traverse

Replication and traverse, &c.

verse was ill, for he might do it of his own accord, to prevent a breach of the peace.

But it was also said, that the defendant's plea was ill, because the action being of a battery at *D.* and the justification at *S.* in the same county, and the bailiffs had authority through the whole county, and so the justification not local; and therefore he ought to have justified in the same place. And if the place had been material, he ought to have traversed all other places within the said county. Wherefore judgment was given for the plaintiff. See 3 *Lev.* 113. Traverse ill, and also plea ill, for want of a traverse.

Upon a justification (for an escape) by a *Habeas corpus, virtute cujus, &c.* The plaintiff in his replication traversed the *Virtute cujus*, and the Chief Justice was of opinion that the traverse was ill, being as alledged of matter in law; but the other three Justices were of a contrary opinion. The plaintiff had judgment. *Lutw.* 632. Traverse of *Virtute cujus, &c.*

Traverse in replication, *De injuria sua propr' absque tali warranto. Et hoc pet' quod inquiratur per patriam.* Exception, that it ought to have been, *absque hoc* that there was such a warrant, and not as above; but the court inclined it was good notwithstanding. 2 *Lutw.* 1460, *&c.* Traverse *absque tali warranto.*

Scire fac' upon a judgment in debt. Defendant pleads a *Fieri fac'* directed to the sheriff of *L.* for levying the debt, and he by force of it took divers sheep of the defendant's for the debt, and yet detains them. *Per cur'*: It is a good plea, although he do not alledge that the writ is returned; and although the writ is conditional, *ita quod habeas denarios, &c.* for the plaintiff hath remedy against the sheriff, and the execution is lawful, which the defendant cannot resist. That the sheriff levied the debt, a good plea.

If in false imprisonment the defendant justifies by a *Capias* of the sheriff, and a warrant of the sheriff to himself; there *De injuria sua propria* generally is not a good plea, because a matter of record is parcel of the cause. But there he ought to say, *De injuria sua propria*, and traverse the warrant, which is matter *en fait.* Where *De injuria sua propria* is not a good plea.

D. brought

Execution against a feme in her name whilst sole, her first name being continued in all proceedings, error. *Ca' sa'.* Averment.

D. brought action of assault, battery, and imprisonment of his wife, against *W.* and *W.* in *C. B.* Defendants plead a special justification, *(viz.)* that in *Nov.* 2 *Jac.* action of trespass was brought by *A.* against *Julian G.* and on general issue found for *Julian G.* and judgment for her; and afterwards, and before execution, *Julian G.* marries the plaintiff *D.* and afterwards writ of error was brought in *B. R.* and upon a *Scire facias* against the said *Julian*, judgment in *C. B.* was reversed; and afterwards *Ca' sa'* was directed to *W.* and *W.* the sheriff, to take the said *Julian G.* and they took her, with an averment, that the said *Julian G.* and the wife of the now plaintiff, was one and the same person.

Demurrer.

Plaintiff demurs, because when the warrant is against *Julian G.* there is no such *Julian G.* for by her marriage with the plaintiff she had another name, and his averment cannot help him, because it agrees not with his warrant. But *aliter*, had the variance been in the name of baptism only.

But *per cur'*: The *Scire facias* was according to the judgment in the *C. B.* and well then might all the subsequent process be so; but if the husband had come upon the *Scire facias*, and shewed how that she was covert, then the action ought to be against both of them. And,

Admittance.

2. The parties themselves, in all the proceedings throughout, have all admitted that she is the same person, and had the same name, and they shall be concluded from saying the contrary. And though the sheriff had shewed the marriage, this was but a bare allegation and suggestion of the sheriff; and it appears not whether it were judicially so or not.

A bare allegation, ill.

3. It would be dangerous for the sheriff to return a *Non est inventus*; for because the parties have all admitted her name to be so in all proceedings, the sheriff shall be estopped also, 3 *H.* 7. 10. and then action on the case would lie on the false return, if the woman should be in the company of the sheriff, and the party shew her to the sheriff, and she escape. *Brownl.* 226. 2 *Bulstr.* 80.

Estoppel.

In

In treſpaſs for taking goods, defendant pleads a recovery in the court of *Dorcheſter*, in debt againſt the plaintiff, and execution upon this by *Fieri fac'*; and juſtifies the taking, appraiſing, and ſale (by conſent) of the plaintiff, in part of the ſatisfaction of the judgment recovered, *quæ eſt eadem captio*. Plaintiff demurs, becauſe the defendant varying in the time of the taking from the time alledged in the declaration, he ought to traverſe any other taking; for the ſame goods may be taken at ſeveral times, and the *quæ eſt eadem captio* is not ſufficient; as 2 *Jo.* 146. Variance in the time of taking from the time in the narr. *Quæ eſt eadem.*

But *per cur'*: The averment ſufficeth. *Keil.* 27. *Bulſtr.* 138. *Cro. Car.* 228.

Juſtification in treſpaſs, aſſault and battery, by proceſs out of an inferior court of record, is not good without ſhewing whether the court was holden by charter or preſcription. 2 *Jo.* 165. By proceſs out of inferior court.

In treſpaſs of battery, the defendant juſtifies by proceſs to arreſt one *Wood*, and the plaintiff would have reſcued him; whereupon he did *molliter manus imponere*. Battery.

The plaintiff replied, *De injuria ſua propria, abſque hoc* that the defendant had *virtute* of ſuch a warrant taken, as that by which the defendant juſtified. Defendant demurs. *Per cur'*: The juſtification is ſufficient, and better by the admittance of the replication, than if the iſſue had been offered *De injuria ſua propria* generally, without ſuch traverſe. 2 *Keb. Rep.* 293. *pl.* 77. *De injuria ſua propria* with a ſpecial traverſe.

In treſpaſs and impriſonment, the defendant juſtifies by a *Capias*, and that the plaintiff did afterwards eſcape; and he being bailiff, did follow him by virtue of the ſame warrant taken out upon the *Capias*. That which is confeſſed and avoided, not to be traverſed.

Plaintiff replies, He eſcaped by the licence of the ſheriff, and traverſeth the later taking by virtue of the warrant. *Per cur'*: The traverſe is idle, becauſe the plaintiff had ſufficiently confeſſed and avoided; and if he eſcaped by the ſheriff's licence, that ought to be the thing put in iſſue, and not the traverſe. *Brownl.* 197.

Not shewn from what court the *Capias* issued.

Upon a justification by a sheriff's warrant held the bar was ill, for that it was not shewn out of what court the *Capias* issued; and for that the plaintiff had judgment. 2 *Lutw.* 1460, *&c.*

Justification by writ *De homine replegiando.*

In trespass against two for assault and battery, and menaces, *&c.* and breaking open the dwelling-house, *&c.* one of the defendants justifies by virtue of a writ *De homine replegiando W. L.* and a warrant delivered to the other from the sheriff for that purpose, in whose aid he entered, the door being open, and the plaintiff assaulted him; whereupon *molliter manus imposuit, &c.* the other defendant imparls.

Oyer of warrant.

Then the plaintiff prays oyer of the sheriff's warrant, which appears to be directed to all his bailiffs, and then replies, *De injuria sua propria*, and traverses, That the first defendant entered by command of the other defendant; and the defendant rejoins, that he entered, *&c.* by command of the other, and then tenders issue thereon. And the plaintiff demurs specially. 2 *Lutw.* 1428, 1432.

Replication, and traverses the command.

Judic' pro quer' for want of averment.

Judgment was given for the plaintiff; and it seems chiefly for the defect of not averring, that *W. L.* that was to be replevied, was in the plaintiff's house at the time of the entry made, *&c.* and the reporter sets forth several cases to that purpose.

The reason.

And as to an exception, that the writ *De homine replegiando* was conditional, as *Nisi captus fuit per speciale mandatum domini regis, &c.* The defendant, he says, ought also to have averred, that *W. L.* was not taken by any special mandate, *&c.*

No precedents to be found.

And the reporter further adds, that being in some doubt as to this matter, he made what search he could, but found not in any book any justification by virtue *De homine replegiando*, or any authority concerning it.

Upon a justification by an attachment of goods, and demurrer, see *Lutw.* 1456, *&c.* that if a trespass be alledged the 10th of *November*, and the justification is the 11th, *quæ est eadem transgressio*, that the plea is good without any traverse.

Quæ est eadem transgressio.

Addition of traverse, ill.

That although the plea was sufficient in matter of substance, yet the addition of the traverse, that they are

are guilty *aliter vel alio modo*, (although meer surplusage) being specially shewn for causes of demurrer, had made it ill. *Mo.* 864. *Saund.* 312.

That an attachment of such a number of goods is not justifiable; and said, that one single thing alone might be attached; and by the Chief Justice, that there ought to be a reasonable distress to make the defendant appear. Attachment unreasonable.

That it did not appear that the sheriffs, before whom the courts were held, had any authority to hold them; and for these reasons, judgment was for the plaintiff. Shews no authority to hold the courts.

See the Judges opinions, 2 *Vent.* 92. upon a special demurrer, that the traverse ought to have been omitted out of the defendant's plea, who justified in trespass, (for impounding plaintiff's cattle, *quousque finem fecit* of 10*l.*) by virtue of a *Fieri fac'* for 10*l.* debt, and 40*s.* for costs, *&c.* upon the sheriff's warrant, whereby he took the plaintiff's cattle in execution, and caused them to be appraised, and kept them in custody until the plaintiff paid the execution money; and traverses that he is guilty before or after. By the Chief Justice and *R.* The justification should have been till he paid the money to the use of the plaintiff, and not to the use of the sheriff; and no authority in law to deliver goods back upon payment of part of the money; it seems the goods ought to have been sold. *Cro. Jac.* 246. Judgment *pro quer'*. Justification of taking cattle on *Fi' fac'*, appraising and detaining them till plaintiff paid the money to the use of the sheriff.

CHAP. XVII.

Sheriffs of London.

IN *London* and *Middlesex*, both sheriffs make but one in both counties; and therefore it seems to be a good cause of challenge, if the writ appears to be returned by one sheriff only; and if one of them dies, Two persons and one sheriff.

See the end of chap. 2.

dies, the office is at an end till another is choſen. The firſt beginning of this cuſtom ſeems to be upon the foundation of the charter of King *John*, who granted the ſheriffwick of *London* and *Middleſex* to the mayor and citizens of *London*, at the farm of 300*l. per annum*. So that being a grant in fee of the ſheriffwick to them as a corporation, they had a right to name one or more officers, in order to execute the ſame; and they thought it proper to name two officers indifferently to execute both offices, and both of them to execute as one ſheriff, tho' the writ in *Middleſex* is directed to them as one, viz. *Vic' com' Middx. præcipimus tibi*; in that of *London*, *Vicecomitibus London' præcipim' vobis*. And the reaſon of this difference ſeems to be, that before this grant of the ſheriffwick to the corporation, the corporation nominated to the crown, and the crown appointed the ſheriffs for *London*, and the *London* ſheriffs were reſponſible to the King for the *London* profits of the ſheriffwick; and that was the reaſon why two were appointed, that both might be reſponſible: and this nomination was, that the citizens might exhibit to the King reſponſible perſons, and that ſeems to be the reaſon that in many of the corporations that are cities and counties, there are two ſheriffs; but when by the charter of King *John* the ſheriff of *London* and *Middleſex* was granted to the citizens as a perpetual fee-farm, then they entered their ſheriffs, which before were nominated for *London* only, and the election of the two was for both ſheriffwicks, but the direction of the King's writs were as before, *viz.* in *London* to the two ſheriffs, and in *Middleſex* as if there was only one. *Gilb. Hiſt. C. P.* 136, 137. 19 *Vin. Abr.* 452. *pl.* 1. 4 *Bac. Abr.* 447.

Both the ſheriffs of *London* are in law but one ſheriff, and the one is not of *London*, and the other of *Middleſex*, as is vulgarly ſuppoſed. *Hob.* 70.

The return of one not good.

And the ſheriff of *London* is known in law to be two perſons; therefore if one ſheriff of *London* make his return without his fellow, this cannot be holpen by *Jeofail*, it being as no return at all, or a return

return without the sheriff's name subscribed. And *London* had no sheriffs in the 13 *Ed.* 1. *Leon.* 284.

London and *Middlesex*, several counties,

Upon a *Capias ad satisfaciendum* to the sheriff of *Middlesex* to take *J. S.* if the sheriff take him and put him in *Newgate*, which is the common prison for *London* and *Middlesex*, and after another writ of execution comes to the sheriff of *London*, although the sheriffs of *London* are also sheriffs of *Middlesex*; and *Newgate* (where the prison is) is the prison for both counties; yet the prisoner shall not be said to be in execution upon this new writ in *London*, nor may the sheriff of *London* serve it upon him, because he is in another county.

Yet *Newgate* is a prison for both *London* and *Middlesex*.

Commitment by sheriff of *Middlesex* is not a commitment in *London*.

For when the *commitment* is to *Newgate* by force of a writ to the sheriff of *Middlesex*, he may not be said in any respect to be in the county of *London*, for the counties continue several, and the persons several, in respect of the several commitments, for there are two several sides, and a partition between them. *Rol. Abr.* 894.

Execution.

By the custom of *London*, the writ of execution is directed to the sheriffs of *London*, and not to the coroner, who is the mayor. 2 *Rol. Abr.* 806.

Outlawry.

The return of the outlawry out of *London* in *C. P.* is generally made without saying, *Per judicium coronatorum.*

Court of conscience before the mayor.

The custom is, when a man is impleaded before the sheriffs, the mayor, upon suggestion of the defendant, may send for the parties and for the record, and examine the parties upon their pleas; and if it be found upon his examination that the party plaintiff is satisfied, that he may award that the plaintiff shall be barred. And this is called, *The Court of Conscience.* 4 *Inst.* 248.

How to lay the custom of the sheriffs.

The plaintiff in assault and battery in his replication saith, "The city of *London* is an ancient city, and have pleas, and that there was a plaint in such a court before *F. M.* by virtue of which process the plaintiff was taken. He should have alledged a custom to hold a court before the sheriffs, and that *F. M.* was then sheriff. It is said, *coram F. M. uno vicecom'*,

it

Two courts.

it is well enough, there being two courts, though but one ſheriff. *Keb. Rep.* 564. *pl.* 7.

Difference of the Entries in the mayor's court and the ſheriff's court.

A clerk of the mayor's court ſaid, that the figures 264 (in their entries) ſignify the 26th day of the 4th month, 26 the day, and 4 the month, accounting *November* (in which the mayor is choſen) the firſt, and ſo the fourth month is *February*.

But in the ſheriffs court they count their months beginning in *October*.

And accordingly it was ordered, that *Aſhfield* the 20th day of *February*, *i. e.* the 4th month, commenced a plaint, *&c.* 2 *Rep.* 380.

Writ of error to be brought in the *Huſtings*.

If an erroneous judgment be given in any of the ſheriff's courts of the city of *London*, the writ of error to reverſe this judgment muſt be brought in the court of the *Huſtings* before the lord mayor, for that is the ſuperior court.

Sheriffs courts, when kept.

The two ſheriffs of *London* do each of them keep a court of record, where they hold plea of all perſonal actions; and the two priſons (called the *Counters*) belong to them.

Two court days apiece, *&c.*

And they have two court days in every week apiece; for the *Woodſtreet counter*, on *Wedneſdays* and *Fridays*; for the *Poulty counter*, on *Thurſdays* and *Saturdays*.

Upon a plaint before any of the ſheriffs.

In a plaint of debt levied before any of the ſheriffs, the cuſtom is, that the ſaid ſheriffs *ore tenus* ſend to the ſerjeants of the counter, either to ſummons or attach the defendant without warrant; and upon *Nihil* returned within the city, that then the ſerjeants, and every of them, by the commandment of the ſheriff, have uſed to attach and arreſt the defendant, to have his body at the next court before the ſheriff at *Guildhall*, *&c.*

Modern practice.

In this manner they certify their records; but the uſual practice is, to enter an action in the office for that purpoſe at one of the *Counters*, which action muſt be entered with care, for it is the original in that court by which you muſt declare, and from whence there muſt be no variance.

Of entering actions in *Counters*.

When an action is entered, then any one of the *Serjeants* may arreſt the defendant, and bring him into

nto cuſtody until he find bail to anſwer the condemnation, which bail is to be taken by one of the clerk-ſitters. Bail.

The defendant may be arreſted by the cuſtom of *London*, after entry of the plaint in the porter's book, before the entry of it in court before the ſheriff: and after plaint entered, the ſerjeant may arreſt without precept. Arreſting by ſerjeants.

The ſerjeant need not ſhew his mace, becauſe he is ſworn and known, although not to the party; and a known bailiff need not ſhew his warrant, although demanded. Serjeant ſhewing his mace.

But in 6 *Rep.* 52. counteſs of *Rutland*'s caſe, a general arreſt by a ſerjeant by ſhewing the mace, and touching his body with it, and ſaying, *Sir, I arreſt you*, is not ſufficient, for he ought to ſhew at whoſe ſuit, out of what court, for what, and of what return, *&c.* that the party may know, *&c. id eſt*, if he demanded it.

In eſcape, the defendant pleads the cuſtom of *London*, that the mayor and ſheriffs of *London* have uſed to enlarge priſoners that were arreſted, in coming and returning from their courts, having cauſes there depending; and ſets forth a plaint in *London* againſt the defendant, and that he was arreſted, and appeared, and pleaded to iſſue; and as he was coming to court to defend that action, he was arreſted, as was ſuppoſed in the declaration. And *per cur'*, The court cannot diſcharge one arreſted, except he be arreſted in the face of the court. *Brownl.* 15. 2 *Lil. Abr.* 457. (E). *T. Raym.* 101. *Bulſt.* 85. That if a man in *Weſtminſter hall* be arreſted in the face of the court, the court may diſcharge him, but not otherwiſe. But the court will, on the plaintiff's motion, order a tipſtaff againſt one walking in *Weſtminſter hall*, againſt whom there is a judgment of the court. *R. Raym.* 48. *Forteſc. Rep.* 242. Eſcape. Whether the court can diſcharge one arreſted, who is coming and returning to the court.

CHAP. XVIII.

Aſſizes and Seſſions of the Peace.

Warrant for ſummoning the aſſizes.

THE form of the warrant made by the ſheriff, or under-ſheriff, for ſummoning the aſſizes, ſee *Dalton* 296. A ſchedule may be filed to the backſide of the warrant, wherein he ſhall ſet down the names of the grand jury and petty jury of life and death, to whom he muſt give warning by his bailiff.

To attend the judges, &c.

The high-ſheriffs themſelves are to attend the judges at the aſſizes, and alſo ſtewards, bailiffs, and other miniſters of any liberties or franchiſes, &c. ſhall be attendant to the juſtices of aſſize and gaol-delivery of the ſame counties, wherein ſuch liberties and franchiſes ſhall be; and ſhall be fined by the judges in caſe of failure. See *Burn's Juſtice*, 4to. 431.

To certify the priſoners names.

Every ſheriff (and all other perſons) which have the cuſtody of the gaols, (or priſoners for felony) ought to certify the names of every of their priſoners, which are in their cuſtody for felony, to the juſtices of the next gaol-delivery, upon pain of 5 *l.* for every default.

Seſſions of the peace.

Precept.

Summoning the ſeſſions.

Jurors, conſtables, &c.

For the precept of the ſheriff for ſummoning the ſeſſions of the peace ought to bear date under the names of two juſtices of the peace at leaſt, and not of the *Cuſtos Rotulorum* alone. It muſt be to ſummon 24 jurors, and to command all conſtables, bailiffs, or coroners, to give their attendance upon the juſtices; and the form of the return of the ſummons.

Riots.

In ſome caſes the ſheriffs are to join with the juſtices of the peace, as in caſe of riots, &c. 13 *H.* 4. *c.* 7.

Forcible entries, &c.

He is to attend and aſſiſt the juſtices of the peace, to arreſt ſuch as ſhall make any forcible entries, or detainer. 15 *R.* 2. *c.* 1.

Grand inqueſt.

He is to ſummon 24 to be of the grand inqueſt.

CHAP.

CHAP. XIX.

Fees.

AT Common law no officer, whoſe office related to the adminiſtration of juſtice, could take any reward for doing his duty, but what he was to receive from the King. 2 *Bac. Abr.* 463. *Lil. Abr.* 808. 10 *Mod.* 139. No fees by Common law.

And the fundamental maxim of the Common law is confirmed by ſtat. 3 *Edw. c.* 26. whereby "No ſheriff ſhall take any reward to do his office, but ſhall be paid of that which he takes of the King; and that he who ſo doth ſhall yield thrice as much, and ſhall be puniſhed at the King's pleaſure." Confirmed by ſtatute.

And ſo much hath this law been thought to conduce to the honour of the King and welfare of the ſubject, that all preſcriptions whatſoever, which have been contrary to it, have been holden void. 2 *Bac. Abr.* 463. No preſcription allowable.

The Common law giving no fees to ſheriffs, made them backwards in executing writs, by reaſon of the great danger both in taking deſperate men, by reaſon of reſiſtance; and alſo in detaining them, for fear of eſcapes; ſo that they would have great rewards, or otherwiſe would do nothing: whereupon the parliament thought fit to ſtint their fees, as in * 9 *Eliz. c.* 4. *per Doderidge J. Latch* 18. *Cro. Eliz.* 654. *pl.* 15. Occaſion of ſtat. 29 *Eliz. c.* 4.

* In an action upon this ſtatute againſt the ſheriff for exceſſive fees, it was moved in arreſt of judgment, becauſe it was ſaid, *ad parliament' tent' per prorogat'*, 15 *Feb.* 29 *Eliz.* and the rolls appeared (by copy ſworn) 29 *October* 28 *Eliz.* the parliament begun, and an adjournment thorough to 17 *Nov.* and no prorogation at all. So 35 *El.* 1. *ſect.* 11. its ſaid, 29 *El.* 6. *&c.* 3 *Keb. Rep.* 742. *pl.* 5. 2 *Mod.* 240. *Anderſ.* 294. *pl.* 303. *Salk.* 331. *pl.* . *Skin.* 364. *pl.* . *Lutw.* 203. 2 *Lutw.* 1117. 4 *Inſt.* 7. *T. Raym.* 1, 2.

A *promoter* of the King brought an action upon the above ſtatute of *Eliz.* againſt *J. B.* under-ſheriff, for taking twenty-pence over his fee, *contra formam ſtatuti*, of a priſoner in his ward, *&c.* The defendant ſaid that he did not take it *contra formam ſtatuti*, *&c.* and gave in evidence, that he and all under-ſheriffs there, time out of mind, have uſed *to take of every priſoner for ſuſpicion of felony and acquitted*, which were in their ward, twenty-pence for a bar-fee, *&c.* And the plaintiff demurred upon the evidence, *&c.* and by the opinion of all the juſtices, this is out of the caſe of the ſtatute, for the intent of the ſtatute is, where he ſo takes of them that be in ward, to eaſe them; but here, when he is acquitted, he is no priſoner: for if he eſcapes, the ſheriff ſhall not be charged of the eſcape, and this fee was aſſigned by the court for a bar-fee, by their diſcretion, *in conſideration of the great charge which the ſheriff has in keeping, bringing, and carrying back the priſoners, and in keeping a number of ſervants to carry them, and in attendance* for fear of eſcapes. And ſo the clear opinion of the juſtices was, that the twenty-pence for a bar-fee is out of the caſe of this ſtatute. *Bro. Abr.* tit. *Fees*, *pl.* 6. 21 *H.* 7. 16.

And if a ſheriff *takes of a priſoner his clothes, or money out of his purſe in ſpite of his teeth*, 'tis out of the caſe of this ſtatute, becauſe *treſpaſs lies*. Bro. ibid. and tit. *Preſcription*, pl. 36. 21 H. 7. 15. S. C.

Fees upon execution.

"It ſhall not be lawful for any ſheriff, under-ſheriff, bailiff of liberties, their officers, ſervants, or deputies, by colour of their offices, to take for the ſerving of any extent or execution, upon the body, lands or goods, of any perſons, more than in this act is appointed, *viz.* twelve-pence for every twenty ſhillings where the ſum exceedeth not 100*l.* and ſix-pence for every twenty ſhillings above 100*l.* that he ſhall levy and deliver in execution, or take the body in execution for; upon pain that every ſheriff, *&c.* which ſhall do the contrary, ſhall forfeit to the party grieved his treble damage, and ſhall forfeit 40*l.* the one

one moiety thereof to the Queen, and the other moiety to the party that will ſue for the ſame." Stat. 29 *Eliz. c.* 4. *ſect.* 1.

This ſtatute doth only extend to their executing of writs of execution in counties, and *not in cities*; and there they are allowed twelve-pence in the pound for the firſt 100*l.* and ſix-pence in every hundred afterwards. But then they ought to pay their own bailiffs out of their poundage money for their pains. But of late, the ſheriffs of cities do demand the ſame as ſheriffs of counties have, and I have heard they have recovered it. *Lil. Abr.* 598.

" This act not to extend to any fees to be taken for any execution within any city or town corporate." 29 *El. c.* 4. *ſect.* 2.

It was reſolved that this proviſo extends to a city corporate, when *judgment* is there *given within their franchiſe*, and execution upon that, and *not when judgment and execution iſſues out of ſuperior courts*. Cro. Car. 287. Latch 17, 52. Poph. 173. For in the firſt caſe, the officer is not at that great care and peril; but as to the ſheriff of a county, his travel and labour is all one, be it in the body of a county, or in a franchiſe: but if that *town be a county of itſelf*, there the ſheriffs ſhall have their fees according to this ſtatute. And now judgment was given for the plaintiff. *Noy* 76.

Becauſe he is at leſs trouble, the juriſdiction is narrow, and the ſheriff not ſo much in danger of an eſcape; but where in the principal caſe the juriſdiction being the palace court of the biſhop of *Rocheſter*, and as large as the dioceſe, and ſo was inſiſted not to be within the like reaſon. But *non allocatur*. 5 *Mod.* 97.

In an information on this ſtatute againſt the ſheriffs of *Glouceſter*, for taking above twelve-pence in the pound *for executing proceſs on a judgment in* C. P. the defendants *pleaded the proviſo* in the ſtatute, *wherein all cities and corporations, and their officers are excepted*, upon which it was demurred; for *Owen* ſerjeant moved, that this proviſo extended only for ſerving executions upon judgments in their courts,

but not upon executions of judgments in other courts; and ſo it may be collected by the preamble and body of the act. But all the other *contra*, for it ſhall be expounded as well for ſerving executions upon judgments in other courts, as in their own courts. *Cro. Eliz.* 263, 264.

And whereas it was objected, that the county *of the city of Glouceſter extends four or five miles* further than the city, and that this *execution was not in the city*, but within the county of the city, and ſo is not within the proviſo; the court ſaid, that if it had been ſo pleaded, peradventure it ſhould be otherwiſe; but as it is pleaded, it appears not to the court: and thereupon it was adjudged for the defendants. *Cro. Eliz.* 264. *Latch* 19, 52. *S. P. per* 3 *J. S. C. Palm.* 399.

Warrant. The ſheriff, by the equity of 23 *H.* 6. *c.* 10. ſhall take four-pence for every warrant. *Winch* 21.

Twelve-pence for every pound of the firſt 100*l.* and ſix-pence for every pound above the 100*l.* There was much doubt upon the words of the ſtatute, and the court divided upon the point, whether the ſheriff ſhould not have twelve-pence in the pound for every pound to 100*l.* and after that ſix-pence? or whether he ſhould have but ſix-pence for every pound when the execution is more than 100*l.*? *Noy* 75, 76.

By 3 *Juſt.* againſt *Crew* Ch. J. the ſheriff ſhall have one ſhilling in the pound for the firſt 100*l.* and ſix-pence for what is over 100*l.* *Poph.* 173. *S. C.* 176. cites a caſe where two juſtices *contra* one held, that where the ſum exceeds 100*l.* he ſhould have but ſix-pence for levying of every twenty ſhillings of the firſt 100*l.* but that judgment was given upon other points, (but adds) that all the court ſeemed to be of opinion, that he ſhall have twelve-pence for every twenty ſhillings of the firſt 100*l.* and ſix-pence for every twenty ſhillings of the reſidue. Held accordingly upon the firſt argument on a demurrer. *Sed quære quia adjornatur.* Cro. Eliz. 335. By *Hobart* and *Winch* J. the ſheriff ſhall have ſix-pence only, if the ſum exceeds 100*l.* *Winch* 51. *Latch* 52. Accordingly adjudged and affirmed in error. *Cro. Car.* 286.

The

The author of the *Compleat Sheriff*, *p.* 479. makes the following *quære*, *viz.* When one ſheriff ſhall make the *Extent*, and the other ſheriff the *Liberate*, who ſhall have the fees given by the ſtatute?

Extent by one ſheriff, *Liberate* by another.

In anſwer to which *quære*, I ſhall ſet forth an act of parliament, to which the above author has often referred his reader in the ſaid *Compleat Sheriff*.

For adjuſting poundage between a ſheriff and his ſucceſſor.

" When any ſheriff ſhall, by proceſs out of the *Exchequer*, extend any goods, *&c.* into the hands of his Majeſty, *&c.* for any debts due to the crown, and ſhall die or be ſuperſeded before a *Venditioni exponas* be awarded for ſale, or before he has made actual ſale thereof, and a writ ſhall afterwards be awarded to a ſubſequent ſheriff, who ſhall make ſale of ſuch goods, *&c.* the barons of the *Exchequer*, if ſitting, or if not ſitting, they or any of them of the degree of the coif, ſhall ſettle the fees or poundage for ſuch ſeizure and ſale, between ſuch preceding and ſubſequent ſheriff, with regard to the trouble each ſheriff had in the execution of ſuch proceſs." Stat. 3 *Geo.* *c.* 15. *ſect.* 9.

By whom to be paid.

Note; The fees ſhall be paid by him that ſets him to work, and not by the priſoner; of whom the bailiff on arreſt having taken ſeven ſhillings for attorny's fees, was convicted of extortion. *Keb. Rep.* 623. *pl.* .

Poundage out of a fine.

Poundage was allowed the ſheriff out of 100*l.* (fine impoſed after conviction on indictment of battery in *K. B.*) levied upon a *Fieri fac'*, and it was allowed out of the money in the hands of the clerk of the crown, paid by the ſheriff; though there was no precedent in *K. B.* for it. But the barons always make ſuch allowance in the *Exchequer*, after the monies paid in there by the clerk of the crown. *Skin.* 12. *pl.* 13. 2 *Jo.* 185.

Not to take fees for levying the King's debts.

" No ſheriff, under-ſheriff, bailiff, or other perſon employed in levying any debts, *&c.* due to the crown by proceſs of the *Exchequer*, ſhall take any fee on pretence of ſuch levying, *&c.* except fourpence for an acquittance, which ſuch officer is to give to the perſon on whom ſuch debt, *&c.* is levied; and the bailiff, *&c.* receiving ſuch debt, *&c.*

ſhall account for the ſame to the ſheriff, and may require an acquittance from ſuch ſheriff without fee; from which debts the ſheriffs ſhall diſcharge the debtors by totting and anſwering the ſame on their accounts in the *Exchequer*; and if any ſheriff, &c. ſhall *nichil* or not duly anſwer to the crown any debt ſo levied, he ſhall forfeit treble damages to the party grieved, and double the ſum, which ſhall be decreed to the party grieved by the court of *Exchequer*, on complaint and proof of ſuch abuſe before the barons, in ſuch ſummary way as to them ſhall ſeem meet. And if any ſheriff, &c. ſhall demand any money from any perſon from whom any debt is payable to the crown by proceſs out of the *Exchequer*, on pretence of executing the proceſs, or in reſpect of fees due for collecting the ſame; or if any one of the officers aforeſaid ſhall demand any ſum for forbearing to levy any ſuch debts written out to them by the ſaid proceſs, every ſuch offender ſhall be adjudged guilty of extortion, injuſtice, and oppreſſion; and being thereof convicted ſhall forfeit treble damages and coſts to the party grieved, and double the ſum extorted; to be decreed by the barons, on complaint and proof, in a ſummary way; provided ſuch conviction be within two years after the offence." Stat. 3 *Geo. c.* 15. *ſect.* 13.

Extortion.

"Nothing in this act ſhall deprive any ſheriff of ſuch poundage or allowance as is hereby given, or of ſuch poundage or reward as may be given them by warrant from the *Treaſury*, Chancellor of the *Exchequer*, or the Barons, for any extraordinary ſervice to the crown." *Ibid. ſect.* 14.

Allowance for levying the King's Debts.

"All ſheriffs who ſhall levy any debts, &c. except poſt * fines due to his Majeſty by proceſs upon the ſummons of the pipe or green wax, by *Levari facias* out of the *Exchequer*, ſhall have an allowance on their accounts of twelve-pence out of every twenty ſhillings, for any ſum not exceeding one hundred pounds, and ſix-pence for every twenty

* See ſtat. 32 *Geo.* 2. *c.* 14. *ſect.* 1. whereby the payment of them is regulated.

ſhillings

ſhillings above the firſt hundred pounds, and for all debts, &c. except poſt fines due to his Majeſty by proceſs and *Fieri facias*, and extent, iſſuing out of the *Exchequer*, one ſhilling and ſix-pence out of every twenty ſhillings, for any ſum not exceeding one hundred pounds, and twelve-pence for every twenty ſhillings over and above the firſt hundred pounds; provided ſuch ſheriff ſhall anſwer the ſame on his account, by the general ſealing day of ſuch term in which he ought to be diſmiſſed the court, or in ſuch time to which he ſhall have a day granted to finiſh his accounts, by the Chief Baron, or one of the Barons of the Coif, and not otherwiſe." Stat. 3 *Geo.* c. 15. *ſect.* 3.

Poundage to the ſheriff upon a *Levari*.

Burrel was outlawed at the ſuit of *Luſcomb* in a plea of debt in the *Common Pleas*, from whence a ſpecial *Capias utlagatum* iſſued, and ſeveral lands of the defendant in the county of *Devon'* were ſeiſed.

The outlawry being tranſcribed into the *Exchequer*, a *Levari* iſſued to the ſheriff, by virtue of which he levied the rents and profits to the value of 60*l.*

The defendant obtained an order for ſix weeks time to plead, and to have reſtitution of the money upon giving ſecurity, which order was ſerved upon the ſheriff, and which he was willing to comply with, *deducting his poundage*, according to the above ſtatute.

Now upon a motion for an attachment againſt the ſheriff for not obeying the order, the queſtion was, whether he ſhould not retain his poundage, or ſhould be left to have it allowed in his accounts with the crown?

And the court ſeemed clearly of opinion he ſhould detain his poundage, and pay the reſidue only to the defendant, but would not abſolutely determine it in this method. *Bunb. Rep.* 305. *pl.* 388.

Habere facias poſſeſſionem.

By *Glynn* Ch. J. There are no fees due to the ſheriff for executing an *Habere facias poſſeſſionem*; and ſo let it be declared, although they have uſually taken fees for executing ſuch writs. *Lil. Abr.* 808.

It

It was reſolved, that the ſtat. 29 *Eliz.* *c.* 4. does *not extend to real executions*, but only to executions in perſonal actions; therefore it does not extend to an *Habere facias ſeiſinam*, or *poſſeſſionem*. Salk. 331.

The ſheriffs took 200*l.* to execute *Hab. fac' poſſeſſionem*. Het. 52. Lit. Rep. 65. 2 Brownl. 283.

Oppreſſion, &c. *Court:* It is great oppreſſion to the ſubjects, that the ſheriffs (to whom the ſtatute had given ſo much in the pound, in caſe of execution againſt a perſonal eſtate) ſhould take ſuch fees in caſe of a real eſtate; and it was ſaid, it was not to be found that they have any legal fee upon this execution: but the uſual fee, which they ought to take, is 2*s.* 4*d.* 2 *Sid.* 155.

Note; A ſheriff was ordered to attend the court for demanding an exceſſive fee for the execution of an *Hab' fac' poſſeſſ'*, the court ſaying there was none due. *Ventr.* 351.

Fees for executing *Ha' fa' poſſ'*. "It ſhall not be lawful for any ſheriffs, or their bailiffs, or for the bailiff of any liberty, by colour of their office, or by reaſon of their executing any writ of *Habere facias poſſeſſionem*, or *Seiſinan*, to receive any greater fee than twelve-pence for every twenty ſhillings of the yearly value of any lands, &c. whereof poſſeſſion or ſeiſin ſhall be given, where the whole exceeds not the yearly value of one hundred pounds, and ſix-pence for every twenty ſhillings *per ann.* above the yearly value of one hundred pounds." Stat. 3 *Geo.* *c.* 15. *ſect.* 16. 8 *Geo.* *c.* 25. *ſect.* 5.

Stat. 29 *El.* *c.* 4. does not extend to executions upon *Statutes-merchant*, *Recognizances*, &c. for the act is to be underſtood of caſes *where the judgment Redditur in invitum*, and not by the voluntary confeſſion of the party. *Salk.* 332.

[*Ca' ſa'*] In an action againſt a ſheriff for his fees, it was objected, that this was a *Ca' ſa'*, the which was not a ſatisfaction, and the ſtatute does not give any fee to the ſheriff, but only permits him to take a fee not exceeding ſuch a rate. But *per cur':* The uſage has always been ſince the ſtatute of 28 *Eliz.* to take a fee upon a *Ca' ſa'*, and ſuch a fee is allowed to the ſheriff for his trouble which he had in the execution; and

therefore, if there be a *ſecond execution*, he ought ave a fee for that alſo for his trouble, as well as he firſt. *Skin.* 363.

pon a *Capias ad ſatisfac'*, the ſheriff ſhall have ees for the whole debt. *Salk.* 331.

owell junior Juſtice ſaid, it was the opinion of Ch. J. that the ſheriff ſhould have fees for *ting an Elegit*; but he ſaid he doubted of that, uſe it would be unreaſonable when the whole is 300*l.* and perhaps the land extended but 20*l.* *nn*, that the ſheriff ſhould have fees for 500*l.* Ch. J. ſaid, that he ſhould have fees *according he ſum levied*, and not according to the debt re- ered, as upon a *Fieri facias*. To which *Powell* vered, that that could not be, becauſe the party ht detain the land till he was ſatisfied the entire ; and the plaintiff is, by having made his elec- , barred of all other executions. *Salk.* 332. *Elegit.*

Poundage in no caſe ſhall be taken on executing writ of *Capias ad ſatisfaciendum*, or on charging perſon in execution by virtue of ſuch writ, for greater ſum than the real debt amounts to; ch ſum the plaintiff is to mark on the back of writ before it be delivered to the ſheriff: and if ſheriff, *&c.* ſhall take greater fees, ſuch offender l be adjudged guilty of extortion, injuſtice, and reſſion; and being convicted ſhall forfeit to the y grieved treble damages, and double the ſum orted; to be decreed by the court out of which writ iſſued, on complaint and proof of ſuch ortion before the court, in ſuch ſummary way as hem ſhall ſeem meet. And every perſon ſo of- ding ſhall forfeit two hundred pounds, one moiety the King, and the other to ſuch as ſhall ſue in court at *Weſtminſter*; provided ſuch ſuit be com- nced within two years after the offence." Stat. *eo. c.* 15. *ſect.* 17. Poundage on a *Ca' ſa'* for no more than is due.

t was held by the court, that the ſtatute extends all *Judgments* in *Weſtminſter*, and that, whether ſheriff executes them in a county or a franchiſe, ſhall have his fees within this ſtatute, *viz.* one lling in the pound for the firſt 100*l.* and ſix-pence

a pound for every other 100*l.* And ſo it is of bailiff of a liberty, when he executes any execut on a judgment given in the courts at *Weſtmin* within his liberty; but if the bailiff or other off executes proceſs on a judgment given *in a court corporation, or liberty*, he is not intitled to fees w in this ſtatute. *Salk.* 331.

Hab' corp'. Upon a *Hab' corp'*, the officer ought to *bring priſoner to the court*, and his refuſal to bring him, leſs paid his fees aforehand, is a contempt; for King's writ muſt be obeyed, and the court will the charges, and compel payment, if the officer priſoner cannot agree, or payment is not made cording to the agreement. 2 *Jo.* 178. *March Kel. Rep.* 280. But ſee *Keb. Rep.* 566. *contra.*

Officer muſt obey writ, though fees unpaid. On a motion againſt *Bambridge*, the warden the *Fleet*, it was held that if an *Habeas corpu* brought, he muſt obey it, though the party ref to pay his fees, for he has a remedy for them. *Stra.* 814. *Keb. Rep.* 272. *pl.* 57.

Sheriff cannot refuſe to obey proceſs for non-payment of fees. The ſheriff had the defendant in execution o *Capias ad ſatisfaciendum*, and the plaintiff deliv him an *Habeas corpus*, in order to remove him the *King's Bench* priſon; the ſheriff upon this infi to be paid his poundage on the execution, befor parted with the body of the defendant, and wo have diſtinguiſhed this from the caſes in 331, 3 333. inaſmuch as he had here actually exec the proceſs, and thoſe caſes go only againſt his ſifting to be paid beforehand. And that ther nothing in the ſtatutes 29 *Eliz. c.* 4. or 3 *Ge* 15. *ſect.* 17. againſt it; and offered, on paymen his poundage, to bring up the body. But the c ſaid, they could not be making bargains with pe to obey their proceſs, which they would enforc obedience to, and leave the ſheriff to his actio debt for the fees, which was his legal remedy. went off, at laſt, upon the ſheriff's ſubmitting carry him to a Judge's chamber. And *Foſter Ju* ſaid, If he was brought to him, he would not t him over till the poundage was paid. 2 *Stra.* 1

n under-ſheriff refuſed to execute a *Capias ad faciendum* till he had his fees; and upon motion nſt him, the court ſaid, that the plaintiff might g an *action* againſt him for not doing his duty, night pay him his fees, and *then indict him for rtion.* Salk. 330. pl. .

was moved that an under-ſheriff might attend refuſing to execute a *Fieri facias*, till his ſhilling e was paid. But the court would not grant the , but ſaid it was *Extortion*, for which he might *ndicted.* Salk. 331. pl. 5.

n treſpaſs and falſe impriſonment the defendant fied under an arreſt, by virtue of a warrant, *&c.* that he detained the plaintiff until he paid him ſhilling and four-pence for fees. And judgment term was given for the plaintiff, becauſe the ndant could not detain for his fees. *Lord m.* 4. Officer cannot detain for fees.

A man was *arraigned of two felonies*, and *paid but one deliverance* only. *Quod nota.* Bro. Abr. *Fees*, pl. 8. cites 26 Aſſ. 47. Where but *one* fee when *two* ſeemed due.

f, upon a ſtatute, *one ſheriff takes the body, and her the goods, per cur':* Both ſhall have their fees. d whereſoever the ſheriff hath *double trouble*, he ll have *double fees.* Comb. 220. Where *two* fees, when but *one* ſeemed due.

He who renders himſelf, and has *Superſedeas be- be is arreſted by Capias* in debt, ſhall make an orney in bank at the day; and this, though *Cepi us* be returned, and ſhall pay no fees upon the cial matter returned, *though he does not ſhew the erſedeas to the ſheriff till after the taking*, if he ders himſelf to him before the taking. *Bro. Abr.* Fees, *pl.* 4. *cites* 21 *H.* 6. 20. Where no fees due.

If an erroneous writ be delivered to the ſheriff, he executes it, he ſhall have fees, though the it be erroneous. *Salk.* 332. Fee on erroneous writ.

A writ of falſe judgment was delivered to the der-ſheriff, but no money was tendered or paid for return; for want whereof the ſheriff took no tice of it, and executed a writ *De executione ju- ii.* Upon hearing counſel on both ſides, the ſhe- 's proceeding was held to be regular. *Per cur':* On writ of falſe judgment, unleſs fees are paid, he may execute a writ *de executione judicii.*

The

The defendant, if he thinks fit, may ſtill proc upon his writ of falſe judgment. *Barnes* 135.

Fees for lodging, &c.

" No ſheriff, bailiff, or other officer, ſhall any greater ſum for one or more night's lodging, for a day's diet, or other expences of any per under arreſt in any proceſs, other than ſhall be lowed by ſome order already made, or which ſ be made, by the juſtices of peace at ſome genera quarter ſeſſions for the county, or place where ſ arreſt ſhall be, who are with all convenient exp tion to make ſome ſtanding orders for aſcertain ſuch charges within their reſpective counties and riſdictions, if the ſame hath not already been th made; and if any ſuch order hath been made, ſ juſtices, at their general or quarter ſeſſions, are to a the ſame from time to time as they ſee occaſion, are to cauſe a copy of every ſuch order, and of ev alteration thereof, ſigned by the clerk of the peace be put and kept in ſome conſpicuous place in the ſions-houſe, or ſome other proper place, of every ſu county, &c. as ſuch juſtices ſhall order, ſo as ſame may be there ſeen and examined as occa may require." Stat. 32 *Geo.* 2. *c.* 28. *ſect.* 2.

Fees to gaolers.

" The Lord Chief Juſtice of the *King's Be* the Lord Chief Juſtice of the *Common Pleas*, and Lord Chief Baron of the *Exchequer*, or any two them, with the mayor and two aldermen, or w three aldermen of *London* without the mayor, for priſoners within the ſaid city; and the ſaid L Chief Juſtices and Lord Chief Baron, or any two them, with three juſtices of peace of the counties *Middleſex* and *Surry* reſpectively, for the priſons the ſaid counties reſpectively, are required, with convenient ſpeed, to meet from time to time at ſu place as they think fit, and to ſettle a table of to be taken by any gaoler in *London*, or in *Middl* and *Surry*, where the ſame hath not been alre eſtabliſhed; and where the ſame hath been e bliſhed, they are to meet and vary the ſame fr time to time as they ſee occaſion; and the juſtices peace of every other county and place, for the p ſons in each county, &c. are, at any general

quar

quarter ſeſſions of the peace, with all convenient ſpeed, to ſettle a table of the fees to be taken by any gaoler within their reſpective juriſdictions, where the ſame hath not been already ſettled; and where the ſame hath been ſettled, to alter the ſame from time to time, as there ſhall be occaſion. And the tables of ſuch fees ſo made or altered for the ſeveral priſons within the city of *London*, and counties of *Middleſex* and *Surry*, ſhall be ſigned by the ſaid Lords Chief Juſtices, and Lord Chief Baron, or two of them, and the mayor and two aldermen of *London*, or by three aldermen without the mayor, and by three juſtices of the peace of the counties of *Middleſex* and *Surry* reſpectively: and the table of ſuch fees made or altered for the reſt of the priſons, ſhall be ſigned by three or more juſtices of the peace, who make or alter the ſame at any general or quarter ſeſſions of the peace; and ſhall afterwards be confirmed, or moderated, within *England*, by the juſtices of aſſize; and if within *Wales*, or the county palatine of *Cheſter*, by the juſtices of great ſeſſions reſpectively, at the next aſſizes, or great ſeſſions, in the reſpective counties within their ſeveral circuits next after the making or altering ſuch table of fees; and the ſame ſhall be afterwards ſigned by the reſpective judges of aſſize, or juſtices of great ſeſſions, who confirm or moderate the ſame, and three or more juſtices of peace of ſuch county, *&c.* for the priſons within their reſpective circuits, counties, or juriſdictions." *Ibid. ſect.* 5.

"No keeper of any priſon, or other perſon there- Penalties on unto belonging, ſhall take directly or indirectly, of gaolers. any priſoner for debt, damages, coſts, or contempt, any greater fees for his commitment, chamber-rent, or diſcharge, than ſhall be allowed in the table of fees inrolled and regiſtered as aforeſaid; and every ſheriff and other officer who ſhall offend againſt this act, ſhall for every ſuch offence (over and above ſuch penalties as he ſhall be liable unto by the laws now in force) forfeit to the party aggrieved 50*l.* to be recovered, with treble coſts, by action of debt, *&c.*

in any court of record at *Weſtminſter*, wherein no eſſoin, &c. ſhall be allowed." *Ibid. ſect.* 12.

Bond for diet.

The warden of the *Fleet*, and the warden of the palace of *Weſtminſter*, may take bond for diet and due fees of the office. *Hetly* 176.

The ſheriff ſhall take ſingle bill for his fees, but not with a penalty.

The ſheriff may take a ſingle bill for his fees, and that is the ordinary courſe, but not with a penalty. To this purpoſe there is a notable caſe, *Winch* 20, 51. *Poph.* 176. *Noy* 75. *Mo.* 853. *pl.* . *Lat.* 20, 51. 10 *Mod.* 85, 86.

Upon bond for fees of a ſtatute to be extended.

The condition of a bond to the ſheriff is to pay 20 *l.* that is, for money which is given to him for his fees, which are due by the ſtatute of 29 *Eliz.* Defendant pleads the ſtatute of 23 *H.* 6. *c.* 10. The caſe was, A ſtatute of 200 *l.* was acknowledged to the defendant by *J. S.* and this was extended by the plaintiff, being under-ſheriff, and it was agreed between *C. E.* brother to the plaintiff, and the under-ſheriff, before the *Liberate* executed, that the defendant ſhould enter into the ſaid bond to the uſe of the plaintiff. Three points were reſolved by the court.

Not within ſtat. 23 *H.* 6. *c.* 10.

1. This bond is not within the ſtatute of 23 *H.* 6. for the party was not within the ward of the ſheriff; and ſo was *Beaufage*'s caſe.

2. Sheriff may not take his ſalary appointed by the ſtatute till a compleat execution, *i. e.* till the *Liberate*; for the words of the ſtatute are in the negative, and do not eſtabliſh the fees, but only tolerate them. And by *Hobart*, if the *coniſee* ſue an *Extent*, and then refuſe to ſue the *Liberate*, to the intent to defraud the ſheriff of his fees, the ſheriff ſhall have his remedy by action on the caſe.

Where action may be by the ſheriff.

But this bond void for extortion.

3. This obligation is void by the Common Law, and extortion. See *Plowd.* 65. The ſheriff may take a bond with a great penalty for the appearance of the party, but not for his fees, by the 23 of *H.* 6. *c.* 10. for that ſtatute, as to fees, is not repealed by 29 *Eliz. c.* 4.

Remedy for fees.

By *Holt* Chief Juſtice, an action will lie for a ſheriff's fee; for the laws permitting him to take it, makes it a duty. *Skin.* 363. *Comb.* 220.

Action

Debt for execution fees.

Action of debt lies for a ſheriff upon the ſtatute of 29 *Eliz. c.* 4. for execution fees, although the ſtatute doth not ſay he ſhall have the fees, nor any action for them; but only ſaith, he ſhall not take for any execution made, any conſideration or recompence, beſides what is therein mentioned, which it ſhall be lawful for him to take, *viz.* 12 *d.* for 20 *s.* where the ſum doth not exceed 100 *l.* and 6 *d.* above 100 *l.* *Rol. Abr.* 598. *Rol. Rep.* 404.

Caſe for fees, and debt for his fees, not prohibited.

The ſheriff ſhall have action on the caſe, but not debt, upon *Aſſumpſit*, to pay his fees due by the law of the realm, for executing an execution. *Moor* 699. But he ſhall have debt for his fees not prohibited by the ſtatute of 29 *Eliz.* *Moor* 667, 853.

Action lies for fees for executing an *Elegit*.

The action was laid in *Cambridgeſhire*, and tried at *Cambridge*.

An action of debt was brought by the ſheriff of *Cambridgeſhire*, upon the 29 *Eliz. c.* 4. for his fees for executing an *Elegit*; and upon *Nil debet* pleaded, there was a verdict for the plaintiff. And Mr. *Page* and Mr. ſerjeant *Cheſhyre* took ſeveral exceptions in arreſt of judgment. Firſt, that no fees were due for executing an *Elegit* within the ſtatute, and conſequently that the action lay not; for the land extended may be of little value, and therefore it is unreaſonable that the ſheriff ſhould have poundage of the whole debt. And where the land lies in ſeveral counties, a man may pay more in fees than his debt. And the caſe of *Bridge* and *Cage*, 2 *Cro.* 103. was cited. An *Aſſumpſit*, in conſideration that the plaintiff would execute a writ of *Elegit* for a friend of the defendant's, to pay, *&c.* and held, that no action would lie, though the money promiſed to be paid was no more than his ſhilling-pence come to. In anſwer to this exception, ſerjeant *Parker* cited the caſe of *Spring* v. *Eeds*, which was *intr. Hil.* 28 *&* 29 *Car.* 2. *C. B. Rot.* 1410. where in the very ſame action judgment was given for the plaintiff, and that judgment affirmed in the *King's Bench*, the record of which affirmance is *Hil.* 29 *&* 30 *Car.* 2. *B. R. Rot.* 386. As to the objection, where the land ſhould happen to lie in ſeveral counties, there was nothing of that in the preſent caſe. The reaſon

2 *Mod.* 240.

of the caſe in 2 *Cro.* he ſaid, was, becauſe in that time the judges held no action would lie upon the ſtatute; but that has been held otherwiſe ſince, 1 *Cro.* 286, 287. *Jones* 307. where actions are maintained by ſheriffs for fees for executing *Capias ad ſatisfaciendum.*

Holt Chief Juſtice ſaid, There was no reaſon why the ſheriff ſhould not have fees, as well for executing an *Elegit*, as an *Extent* upon a ſtatute. Upon the writ of *Elegit*, the ſheriff returns, that he has taken an inquiſition, and extended the defendant's land, and delivered it to the plaintiff. And there is a *Liberate* in the body of the writ of *Elegit*, otherwiſe in caſe of an extent upon a ſtatute there muſt be a *Liberate*; and in the caſe of the *Elegit*, upon the return of delivery, the plaintiff may enter: and he can do no more in caſe of a ſtatute after a *Liberate* executed, for he muſt not enter by force. The return of *Liberari feci* is a full execution of the writ of *Elegit*, and by that the plaintiff becomes tenant by *Elegit*, and may maintain an ejectment; and he may enter and aſſign his intereſt upon the land, and the aſſignment will be good. For the defendant's continuing in poſſeſſion after the return of the writ, turns the plaintiff's eſtate to a right, and therefore he muſt enter before he can aſſign it over.

Powell Juſtice ſaid, that the like caſe with this was adjudged in the *Common Pleas*, while he ſat there; that all the objections, that are here made to the action, were made there, and over-ruled; that the court there reſolved, that the ſtatute of *Eliz.* mentioning extents, that ſhould not be confined to extents upon ſtatutes only, but ſhould be carried to extents upon *Elegits*, eſpecially when they were both equally liable to the ſame exceptions. As to the objection how it ſhould be, when ſeveral *Elegits* were to go into ſeveral counties, they ſaid, they would give their reſolution in that when it came in queſtion; and therefore he was of opinion, that the ſheriff ſhould have his fees for executing an *Elegit*. The other two judges agreed.

The

The ſecond exception, and which was the only one that ſtuck with the court, was, that the plaintiff had laid in his declaration, that the inquiſition was taken *apud villam Cantabrigiæ prædictæ*; and there was no *Cambridge* mentioned before. And this objection was inforced two ways. Firſt, there was no *Venue* where this fact, which was ſo material, and the very ground and foundation of the action, was done. Secondly, that it did not appear that this inquiſition was taken within the county of *Cambridge*, as it ought to do, to intitle the plaintiff to his action: for as *Powell* Juſtice ſaid, there are more towns in *England* of that name beſides that where the univerſity is, and for aught appears, it might be one of them where this inquiſition was taken, and conſequently out of the county; and ſo the execution void, and conſequently the plaintiff has no cauſe of action.

In an inquiſition took on an *Elegit*, want of naming the place aided after a verdict, in an action for fees.

After conſideration as to the firſt part of the objection, it was reſolved by *Holt* Chief Juſtice, (to which the others agreed) that this was helped after verdict by the ſtatute 17 *Car.* 2. *c.* 8. as no *Venue*, the cauſe having been tried by a jury of the proper county. And he compared it to the caſe in *Lev.* 207. upon an iſſue joined in an action of covenant, whether *J. S.* had any title to *Shrob-walk* in the foreſt of *Whittlewood*, in the county of *Northampton?* The action was laid in *London*, and the *Venire facias* was from *Shrob-walk*; and though it was agreed, that a walk in a foreſt was but a liberty, and no place from which a *Venue* could ariſe, yet this want of a *Venue* was aided by the 17 *Car.* 2. the iſſue having been tried by a jury of the county, where the matter in iſſue aroſe. As to the ſecond, it was anſwered by the counſel for the plaintiff, and reſolved by the court, that that was helped by the verdict, for the iſſue being upon *Nil debet*, if the *Elegit* had been executed out of *Cambridgeſhire*, it had been a void execution, and conſequently againſt the plaintiff, and the jury muſt have found for the defendant *quod nil debet*; and therefore a verdict being now found for the plaintiff, it muſt be intended

Note; this ſtatute has been confined ſince to the letter, *viz.* county where the action is laid; but that is not this caſe, becauſe the action here is laid in the proper county, and tried there alſo, and ſo within both the letter and meaning of the ſtatute.

that *Cambridge* is the county of *Cambridge*; for it it muſt be intended that a record was given in evidence of an inquiſition taken within the county of *Cambridge*. Judgment was given for the plaintiff. 2 *Ld. Raym.* 1212. *Salk.* 333.

Not to arreſt.

The giving money to a ſheriff, to arreſt a man, is againſt law. *Rol. Rep.* 313.

Where not upon his delivering warrants.

It was held that a ſheriff cannot take money for fees upon delivery of warrants to his own bailiff, but muſt ſtay till the money is levied; but in caſe of ſpecial bailiffs, of plaintiff's own naming, the ſheriff may take his fees preſently. *Clayt.* 79. *Mo.* 468. *pl.* 669.

Not upon *Cap' utlag'*.

No fee is due to the ſheriff for executing a *Cap' utlagat'*, either for warrant to execute it, or for the return of it. *Lit. Rep.* 65. 2 *Brownl.* 283.

Extortion for ſparing perſons to appear.

If any bailiff, or other ſheriff's officer, ſhall take any thing of any perſon, to ſpare them for appearing at the aſſizes, ſeſſions of the peace, or the like, it is extortion. *Compl. Sher.* 483.

How far the court will grant an attachment againſt a bailiff for extortion.

On rule to ſhew cauſe why an attachment ſhould not go againſt one *Clendon*, for extorting two guineas from the defendant, before he would allow him to be bailed, his counſel ſaid, that the defendant abſconded, and for that reaſon *Clendon* was forced to be made a ſpecial officer in the writ, and the fee for that is 10*s.* of the money. Beſides, he was two days lying in watch for him, with a couple of followers; he thought 1*l.* 12*s.* little enough for that. The court ſaid, the fee of 10*s.* is certainly due, and the reſt of the money is moderate enough; but yet it ought not to have been demanded of the defendant, ſo granted the attachment. *Barnard. K. B.* 107.

For omitting arreſts, &c.

If the ſheriff, or any of his officers, ſhall take any money, or other reward, for the omitting any arreſt or attachment to be made, it is extortion; and the ſheriff or officer ſo offending, ſhall forfeit for every ſuch offence 10*l.* to the King and informer. 23 *H.* 6. *c.* 10.

As

As to the puniſhment of ſheriffs for extortion, it is either by *indictment*, *information*, *impriſonment*, or *commitment*. Puniſhment for extortion.

As to *indictments*, what is good or not.

Indictment of extortion againſt a bailiff of an hundred, *quod colore officii* he took *extorſive* money, and ſhews not for what matter or cauſe. *Court:* It is well enough, the officer being bailiff of an hundred, eſpecially being after a verdict. But *quære* of this. *Keb.* 557. *pl.* . Indictment.

By 23 *Hen.* 6. *c.* 10. on extortion, treble damages are given to the party, and the juſtices of peace may aſſeſs them; but they ought firſt to enquire of the damages by a jury. Therefore in *Bumpſtead*'s caſe, *Cro. Car.* 488. *pl.* . indictment was againſt the ſheriff for extortious fees, on two ſeveral indictments. They awarded to the one treble damages; that is, where he took of one 20*s.* *extorſive*, they awarded to the party 3*l.* and 4*l.* to the King. And on the other, where it was found he took 8*s.* 8*d.* *extorſive*, they awarded he ſhould pay to the party 26*s.* 8*d.* So a quadruple value, and 20*s.* fine to the King. And it was adjudged error. *Cauſa qua ſupra.* Treble damages. Quadruple. Error.

The indictment muſt be *Contra formam ſtatuti*, if they will proceed upon the ſtatute of 23 *H.* 6. *id. ibid.* The court were doubtful, if this ſtatute extends to extortion, unleſs taken upon arreſt. And judgment was reverſed. *Contra formam ſtat.* 23 H. 6.

The ſheriff's bailiffs were indicted at the quarter ſeſſions for extortion. *W. Jo.* 379. Indictment at quarter-ſeſſions.

It was ſaid by *Holt* Chief Juſtice, at a trial at *Guildhall*, that if a man be indicted for taking extorſively twenty ſhillings, and there is but proof of one ſhilling, yet the defendant is guilty. And (by him) the extorſive agreement is not the offence, but the taking; for a pardon after the agreement, and before the taking, does not pardon the extortion. *Ld. Raym.* 149. Indictment of extortion in taking 20*s.* will be maintained by evidence of taking 1*s.*

An informer, on conviction of a priſoner for extortion, or other penal law, may have the third part of the fine, according to the King's privy ſeal for that purpoſe. And he had ſo of 10*l.* ſet on a bailiff Information, informers have the 3*l.*

for 3*l.* taken for execution done to his perſon. *Keb.* 357. *pl.* 487. *pl.* .

The priſon miſtaken.

Information was brought againſt the keeper of the gaol, or priſon of the caſtle of *Maidſtone*, for extortion on the ſtat. 23 *H.* 8. and it was found by ſpecial verdict that there is not any caſtle in *Maidſtone*, but a gaol, and the defendant was gaoler there. *Per cur':* Judgment *pro querente.* 2 Rol. Abr. 211.

Sheriff committed.

The ſheriff was committed to the *Fleet*, for taking illegal fees. 2 *Brownl.* 283.

Serjeant committed for taking illegal fees, no mitigation of fine.

A ſerjeant of *London* was committed in execution for a fine in extorting fees on an arreſt, and a third part was allotted to the proſecutor; his wife petitioned the court to mitigate the fine, but they could not. 3 *Keb.* 328. *pl.* .

The ſheriff of *Suffolk* was impriſoned for taking a *guinea*, there being only 2*s.* due to him, and he returned two *guineas* to the plaintiff, being double of what he had taken, on the 3 *Ed.* 1. *c.* 26. and ſo he was diſcharged. 3 *Keb.* 714. *pl.* .

In replevin, *the ſheriff preſcribed to have forty ſhillings per ann.* of J. N. and his anceſtors, *for holding of his turn at* D. *for the eaſe of the defendant and his tenants*, for which ſum he diſtrained. And *per cur':* He cannnot preſcribe, for he is an officer removable yearly, and therefore the taking of the ſaid ſum is *Extortion.* Bro. *tit.* Fees, *&c.* pl. 18. 42 E. 3. 4. Bro. Abr. *tit.* Corone, pl. 103. S. C. per Shard. Bro. Abr. *tit.* Office and Off. pl. 31. S. C. S. P. Bro. Abr. *tit.* Preſcription, pl. 9. 40 E. 3. 4.—but ſhould be 42 E. 3. 4.

Promiſe of money for ſerving of proceſs.

If a ſheriff, *&c.* aſſume for money given to ſerve certain proceſs, this is not a good conſideration, as being againſt law; for it is extortion in the ſheriff to take it, and unlawful for the other to give it. *Rol. Abr.* 16. 19 *Vin. Abr.* 445. *pl.* 3. *Ergo Cro. Eliz.* 654. is not law. Executor ſues execution by *Elegit*, and *B.* an eſtranger, as a friend to the executor, in conſideration that the ſheriff will execute the ſaid *Elegit* preſently, and of ſix-pence paid him by the ſheriff, aſſumes to pay 60*l.* to him; whereupon the ſheriff executes the writ. This conſidera-

By a ſtranger, if he would execute an *Elegit*, ill.

tion is againſt law, for the ſheriff ought to do his duty without reward; and this 60 *l.* is not any diſcharge of ſheriff's fees due by the ſtatute, being given by a ſtranger, and not expreſs for them. *Rol. Abr.* 16. And though it was alledged, that this ſum promiſed him is no more than what the ſtatute of 29 *Eliz.* allows him to take for his fees, yet that helps not the caſe, for that ſtatute only excuſeth him for his taking fees, whereas the Common law did not permit him to take any thing for the executing writs. And the giving of ſix-pence is no ſufficient conſideration, being joined with the other that is unlawful. *Cro. Jac.* 103.

And no diſcharge of the ſheriff's fees.

A. is outlawed at the ſuit of *B.* for debt, and *B.* aſſumes in conſideration that *C.* an eſtranger will arreſt *A.* upon a *Cap. utlagat'*, that he will pay him 40*s.* This is no good conſideration, although he ſhews in his declaration that he was after made a ſpecial bailiff to the ſheriff, to arreſt him by a warrant directed to him. This is extortion; and the ſheriff, by ſuch means, may extort great ſums for doing his office: and the bailiff is the officer of the ſheriff, and his ſervant. *Rol. Abr. ib. Jones* 65. *Latch* 54. But if a promiſe be made to a meer ſtranger to go to the ſheriff, and procure him to arreſt *J. S.* this is a good conſideration. So if one pray me to go with the ſheriff to aſſiſt him in making execution, and promiſeth me, *&c.* it is good.

In conſideration that *C.* an eſtranger will arreſt a man.

Promiſe to a ſtranger to procure the ſheriff to arreſt *J. S.* is good.

It is the duty of the ſheriff of *Middleſex*, by himſelf and deputies, to attend all his Majeſty's courts, judges, juſtices, and commiſſioners within his county; and to execute all writs and proceſſes by them and every of them directed to him; and alſo to hold his county courts, tourns and court leets within the ſame.

The fees of the ſheriff of *Middleſex*, his under-ſheriff, *&c.*

The ſheriff of *Middleſex*, who are alſo ſheriffs of *London*, is nominated by the citizens *(a)* thereof; and are, as ſheriffs of *London*, at much greater expence in paſſing through their office, than the ſheriff of any other county in *England*; and therefore oblige

(*a*) *Show. Rep.* 289.

their under-ſheriff of *Middleſex*, out of the fees and profits ariſing from that office, to advance money from time to time to pay all rewards, payable by the ſaid ſheriff, for apprehending highwaymen and other malefactors, which are given by ſeveral acts of parliament, and to pay the wages of the juſtices of peace attending at the ſeveral ſeſſions of the peace for the ſaid county of *Middleſex*, and to bear part of the expence at the entertainments at the ſeſſions of gaol-delivery held in the *Old Bailey*, *London*, for the county of *Middleſex*; which, together with other charges incident to the ſaid office, amounts annually at leaſt to the ſum of 450*l.* For the diſpatch of the buſineſs of the county, he keeps his office at *Furnival's Inn*, *Holborn*, wherein, beſides his own attendance, three clerks are dayly imployed, (*Sundays* and holidays excepted); they have no ſalary nor wages, but the allowance hereafter mentioned, out of the fees. And in conſideration of his giving ſecurity to the ſaid ſheriff, in the ſum of 12,000*l.* to indemnify him from all damages and loſſes that may happen from the miſtake, omiſſion, or miſdemeanor of him, his deputies, clerks, or bailiffs, the ſheriff hath granted to him all the lawful fees, profits, and perquiſites belonging to the ſaid office; and in virtue thereof he claims the ſeveral fees and ſums of money hereafter mentioned, which are all the fees belonging to the ſaid office, except what may be claimed by the county clerk.

To

	Sheriff	Clerk	Total
	l. *s.* *d.*	*l.* *s.* *d.*	*l.* *s.* *d.*
To the charge of paſſing the ſheriff's accounts for *Middleſex* in the *Exchequer*, by ſtat. 3 *Geo.* 2.	119 3 0		
Of every bailiff, when admitted into his office, in lieu of all fees due to the ſheriff on arreſts that may come to his hands, except fees on executions, (commonly called *poundage.*)	6 10 0		
Of every bailiff more for his indenture of covenants, and bond to perform the ſame, and attending the execution thereof.		1 1 6	
For every warrant on a bill of *Middleſex*, *Capias*, or *Quo minus*	0 0 4 *Winch's Rep.* 21.	0 2 0	0 2 4
For every name more than one		0 0 4	
For every warrant on a ſpecial *Capias*, or *Quo minus*, i. e. containing the whole declaration	0 0 4	0 2 0	0 2 4
For every warrant on a writ of *Scire facias*, Extent, *Elegit*, Summons againſt privileged perſons, Original in real or perſonal actions, *Pone*, *Ven' facias* out of the *Exchequer*, Attachment for the peace out of the crown office, *Diſtringas*, Writ of poſſeſſion, *Capias excommunicatum*, *Ne exeat regno*, *Supplicavit*, and *Si laicus*		0 2 4	
For every bail bond taken in the office, (which rarely happens, the bond being uſually taken from defendants in cuſtody by			

the

	Sheriff			Clerk			Total		
	l.	*s.*	*d.*	*l.*	*s.*	*d.*	*l.*	*s.*	*d.*
the bailiff) for searching the office, and making a *Superſedeas* to ſet the defendant at liberty				0	9	4			
For taking ſecurity on a writ of *Ne exeat regno*, ſearching the office, and *Superſedeas* to ſet the defendant at liberty				1	1	0			
For a bond on an attachment *Pro pace* out of the crown-office				0	2	4			
For taking ſecurity on a writ of *Supplicavit*, which rarely happens, ſearching the office, and for a *Superſedeas* to ſet the defendant at liberty				0	10	6			
For the aſſignment of every bail-bond	0	2	4						
For the plaintiff's diſcharge for the ſame	0	2	4	0	5	0			
For the return of the writ	0	0	4						
For the delivery up of a bail-bond back to the defendant, by the plaintiff's order				0	5	0			
Fees for returns of writs.									
For allowing every writ of *Habeas corpus cum cauſa*	0	4	8						
For the return thereof, if but one writ, to be returned againſt defendant	0	2	4						
For a warrant to the bailiff to conduct the defendant before the judge, or court, as the writ is returned	0	2	4						
	0	2	0	0	7	4	0	9	4
For every other writ againſt the defendant returned thereon	0	2	0	0	2	4	0	2	4
If the defendant is in the gaol, then for a warrant to the keeper to deliver the defendant to the bailiff				0	2	4			

For

	Sheriff			Clerk			Total		
	l.	*s.*	*d.*	*l.*	*s.*	*d.*	*l.*	*s.*	*d.*
For executing a writ of enquiry of damages, and return of the inquisition thereon	0	10	0	0	3	4			
To the bailiff, for summoning and swearing the jury	0	4	0						
For the use of the court-house, or room where the writ is executed	0	1	0				1	10	4
To the jurors, each 1*s.*	0	12	0						
	0	17	0						
For swearing each witness — —				0	0	4			
For taking an inquisition on a *Capias utlagatum*, schedule of the goods seised, and return thereof				0	18	6			
To the bailiff for summoning the jury	0	4	0						
To the use of the room, where the inquisition is taken	0	1	0				0	15	6
To the jurymen, each 1*s.*	0	12	0						
	0	17	0						
If more than one finding, for every other				0	3	4			
The like on extents — —				0	18	6			
For every finding, if more than one, each				0	3	4			
Attending each adjournment — —				0	10	0			
For every summons for a witness to give evidence				0	2	0			
For taking an inquisition on a *Scire Fieri* inquiry, inquisition, and return thereof	0	10	0	0	8	6	0	18	6
For the return of a *Cepi corpus*, or *Non invent.* on every bill of *Middlesex*, *Capias quo minus*, *Capias ad satisfaciendum*, and *Capias utlagatum*, if no inquisition taken				0	0	4			

	Sheriff	Clerk	Total
	l. *s.* *d.*	*l.* *s.* *d.*	*l.* *s.* *d.*
For the like return, if by a bailiff of a liberty		0 0 8	
Return of *Iſtud breve*		0 0 4	
For returning *Fieri feci* on a *Fieri facias*		0 2 0	
If by the bailiff of a liberty		0 4 0	
For returning *Nulla bona* thereon		0 1 0	
If by the bailiff of a liberty		0 2 0	
For ſpecial returns, ſuch as reſcue, defendant diſcharged by *Superſedeas*, or committed to the *Fleet*, or *King's Bench* priſon, on a writ of *Habeas corpus*		0 2 4	
For the return of *Venditioni exponas*		0 2 0	
For the return of *Scire feci*, each name		0 2 0	
For the return of *Nihil*, or *Mortuus*, on a *Scire facias*		0 1 0	
For the return of an eſcape warrant		0 2 0	
For the return of a *Venire facias*, ſummons againſt privileged perſons, or original, that the defendant is ſummoned		0 2 0	
For the return of a *Nihil* thereon		0 1 0	
For the return of *Non invent.* on an attachment out of the courts of *Chancery*, *Exchequer*, or dutchy of *Lancaſter*		0 1 0	
For the return of a *Cepi corpus* thereon		0 2 0	
For the return of *Non invent.* on a proclamation out of the courts of *Chancery*, *Exchequer*, or dutchy of *Lancaſter*		0 2 0	
For the allowance of every writ of *Superſedeas*, or reſtitution	0 2 0	0 0 4	0 2
For a warrant thereon to diſcharge the defendant's body or goods out of cuſtody		0 2 4	

	Sheriff	Clerk	Total
	l. s. d.	l. s. d.	l. s. d.
For the return of a writ of *Venire facias juratores*, with the panel of 48 freeholders names thereto annexed	—	0 2 0	
For the return of a writ of *Diſtringas*, or *Habeas corpora*, with a panel of 48 freeholders names annexed thereto		0 12 0	

N. B. The ſheriff makes up a panel of 48 jurymen, for each court in *Weſtminſter Hall*, every term; but before he can do that, by his officer, he enquires after a competent number of perſons names, taken out of the freeholders book for that purpoſe, makes out a warrant to his bailiff to ſummons them, delivers a panel to the marſhal of each Chief Juſtice, or Chief Baron, attends the court by himſelf or deputy during each Seſſions of *Niſi prius*, and after term enters the names of each juryman in an alphabetical regiſter, and gives certificates to each juryman of his attendance, (if required); for all which no fee is claimed or taken.

	Sheriff	Clerk	Total
	l. s. d.	l. s. d.	l. s. d.
For the return of a writ of poſſeſſion		0 2 0	
Attending the maſter of the *King's Bench* office, prothonotary of the court of *Common Pleas*, or deputy-remembrancer of the court of *Exchequer*, from the plaintiff and defendant, each one guinea	2 2 0		
For attending with the jury on a view, and certifying to the court that the view has been had, the ſame fee as is paid to each juryman			
For attending every trial at bar, or at *Niſi prius*, where a ſpecial jury is ſummoned, the ſame fee as is given to each juryman after the trial			

N. B.

	Sheriff	Clerk	Total
	l. s. d.	l. s. d.	l. s. d.
N. B. The laſt mentioned fee is taken by the under-ſheriff, or clerk, who attends the trial.			
For every warrant to a bailiff to ſummon a ſpecial jury		0 2 4	
Fees called Poundage.			
For taking a defendant in execution, or levying the goods, for every ſum of money not exceeding 100*l.* for every 20*s.* thereof	0 1 0		
For every 20*s.* exceeding that ſum	0 0 6		
For the like on an extent, *Fieri facias*, or *Capias ad ſatisfaciendum*, at the ſuit of the King	0 1 6		
For every 20*s.* after the firſt 100*l.*	0 1 0		
For every 20*s.* levied on a *Levari facias*, the ſummons of the pipe or green wax, (except poſt fines)	0 1 0		
For executing every writ of poſſeſſion, for every 20*s.* of the yearly value of the premiſſes, of which poſſeſſion is given	0 1 0		
For the return of a precept to ſummon the jury before the commiſſioners in a commiſſion of ideocy or lunacy, and attending thereon	2 2 0		
For the return of a *Venire facias jur'*, and attending the trial of a traverſe at the ſeſſions of the peace on every indictment, except for felony, or where the defendant is in priſon		0 10 0	
N. B. The ſheriff ſummonſes, impanels, and returns 8 grand juries in the year, at the ſeveral ſeſſions of the peace at *Hicks's*			

Hall,

	Sheriff	Clerk	Total
	l. s. d.	*l. s. d.*	*l. s. d.*
Hall, and attends by his deputy during all the time of the seſſions there; and alſo returns 8 juries in the year at the ſeveral ſeſſions at the *Old Bailey*, beſides party juries, and juries of matrons; and attendants there, without any other fee or reward whatſoever.			
For a bill of ſale of goods on a *Fieri facias*, and an inventory thereunto annexed		0 9 0	
For a bill of ſale of a term of years		0 13 4	
The like on a *Venditioni exponas*		0 13 4	
For allowing a writ of *Non ponend' in aſſiſ'*		0 13 4	
For charging a defendant in cuſtody with every other writ than that on which he is arreſted		0 2 4	
For a certificate in order for a *Superſedeas*		0 2 4	
For a certificate that the defendant is in execution, in order for his diſcharge by the late act of parliament		0 2 4	
For his diſcharge by the rule of court thereon	Nothing		
For attending with writs and other things out of the office, to be produced on trial, for each day's attendance		0 6 8	
For the plaintiff's diſcharge on every writ of *Fieri facias*, whereon money has been levied, or on a *Capias ad ſatisfaciend'* executed on the defendant, and on every writ on which the defendant is committed to the gaol		0 2 4	

For

	Sheriff	Clerk	Total
	l. s. d.	l. s. d.	l. s. d.
For ſearching the books and files, and a warrant to the keeper of *Newgate* to diſcharge the defendant out of cuſtody		0 2 0	
N. B. The defendants are oftner diſcharged out of *Newgate* without paying any fees than with.			
Copies of writs are given, and ſearches are made for priſoners in *Newgate*, without any fees for the ſame.			
For every ſearch		0 0 4	
For a ſhort copy of a writ, in order to put in bail by		0 0 6	
For ſearching for a writ in force, which is never done but upon the undertaking of ſome attorney, to put in bail thereto		0 1 0	
For a copy of a bill of *Middleſex*, *Capias*, or *Quo minus*, at length		0 1 0	
For copies of all writs, or orher things, for every ſheet of copy wrote		0 0 6	
For executing and returning a writ of falſe judgment, or *Accedas ad cur'*		0 6 8	

Fees for executing a writ of *Ad quod damnum* cannot well be ſettled, but muſt be left to the ſheriff and the party, to be adjuſted between them, becauſe the inquiſition on this writ is always taken on the place where the highway to be incloſed lies, or where the intended fair or market is to be held, which may occaſion the ſheriff's travelling a conſiderable journey.

Fees for executing a writ of partition cannot well be ſettled for the ſame reaſon; and a proviſion is made by ſtat. 8 & 9 *W.* 3. *c.* 31. for ſettling the ſame, in caſe the ſheriffs and the parties cannot agree.

For

	Sheriff	Clerk	Total
	l. s. d.	*l. s. d.*	*l. s. d.*
For attending lord mayor, as conſervator of the river *Thames*; making warrants on the writs of *Capias*, and ſummons and returning the ſame, and for ſummoning, impanelling and returning the grand jury at the firſt court in every year, the water-bailiff pays		1 1 0	
For attending the lord mayor at the ſecond court in every year, and returning the ſummons and *Capias* proceſs, the water-bailiff pays		0 10 6	
For ſummoning, impanelling, and returning the traverſe jury, and attending the trials there, which very rarely happens		0 10 6	
For returning, ſummoning and impanelling a jury, and attending Commiſſioners in a Commiſſion out of the *Exchequer* to find debts		0 10 0	
For the like on a forcible entry before two juſtices, which happens but very ſeldom		0 10 0	
For a warrant on a precept for two juſtices to remove the force after ſuch inquiſition taken		0 2 4	

CHAP. XX.

Bonds, Covenants, &c.

Difference between a covenant and a bond between high-sheriff and under-sheriff.

IF the under-sheriff covenant with his high-sheriff, to save him harmless from all fines and amerciaments for any escape; and covenants also, that he will not execute any writ of *Execution* above the sum of 20*l.* without warrant from the high-sheriff: this last covenant is against law, and void; yet the other is good, (but a bond in such case is void in all) for by the statute of 27 *Eliz. c.* 12. the under-sheriff takes oath to execute all process. *Browni.* 65. *Godb.* 212. 12 *Mod.* 468. *Hob.* 12. *pl.* 25. *Mo.* 856. *pl.* 175. *Noy* 51. *Cro. Eliz.* 440. *pl.* 1. *Hetl.* 157.

To save sheriff harmless from escapes.

The keeper of *Ludgate* gives bond to the sheriffs of *London*, that he should safely keep the prisoners committed to his charge, and should save the sheriff harmless from all escapes. The bond is good. (*Quære* as to the last part.) *Cro. Eliz.* 466. *pl.* 17.

Escape on *Cap' utlagatum* being void, because returned ten years after it was awarded.

But it is not forfeited by escape of one taken by a *Capias utlagat'* in debt; because the *Capias utlagatum* was awarded the 25th of *Eliz.* and was returnable the 35th of *Eliz.* and so meerly void. For every *Capias* ought to be returnable the insuing term; because of the mischief that otherwise might befall the prisoner to be kept always in prison, and he might well let him at large. *Dy.* 175.

No lawful imprisonment.

Though peradventure this arrest, by force of this process, is excusable in false imprisonment by the sheriff, yet clearly it is no lawful imprisonment; and as to the prejudice or benefit of a stranger, he shall never be said to be a prisoner. 14 *H.* 8. 16. 11 *H.* 4. 36.

Upon covenant that defendant should not let at large any prisoner arrested in debt.

Debt on bond to perform covenants; which was, that the defendant should not let at large any prisoner arrested, without the sheriff's warrant. The plaintiff shews, the defendant had let such a pri-

soner

ſoner at large at *Weſtminſter*, *&c.* it is good without ſhewing the time and place of the arreſt. For the eſcape is the material part of the covenant, and the manner of the arreſt is not in queſtion; and whether he were legally taken or impriſoned, was not material, when he was ſuffered to go at large. *Sid.* 3.

For a bailiff of an hundred to make true return of all his writs.

The condition of the bond was: Whereas *S.* was ſheriff of *Surry* and made *T.* bailiff of the hundred of *B.* now if he ſhould execute his office, *&c.* and make true return of all writs directed to him, then, *&c.* defendant pleads on *Oyer* particularly, performance to all. Plaintiff replies, proceſs was directed to him to levy iſſues on *J. S.* and that he made his warrant to *T.* to execute the ſame, which warrant he did not return.

On demurrer judgment for defendant.

On demurrer, judgment was againſt the plaintiff; becauſe he did not ſhew that the iſſues were to be levied in the hundred of *B.* for though the words are general, to make return of all warrants directed to him, yet it was to be underſtood of ſuch only as were to be executed in his own hundred, of which he was bailiff. *Al.* 10. 2 *Saund.* 414, 415.

To pay the expence of the high-ſheriff.

Debt on a bond by under-ſheriff, to defray the expence of the high-ſheriff; and performance pleaded. Plaintiff replies, *J. S.* recovered his charges in carrying the priſoner from *Chelmsford* to *London*, not ſhewing it was done by *Habeas corpus*. Defendant rejoins, this was by private agreement. Plaintiff demurs becauſe it was not concluded to the country. *Court:* There muſt be a compulſion ſhewed by *Habeas corpus* to the ſheriff of *Suſſex*, without which he cannot deliver him over to another ſheriff; and then there is an allowance upon the account in the *Exchequer*, in caſe of tranſporting, being ſigned by the judges. And the court gave leave to diſcontinue. 3 *Keb. Rep.* 448. *pl.* 9.

Under-ſheriff gave bond to high-ſheriff without condition, but intentionally for performance of cove-

nants to ſave the high-ſheriff harmleſs from eſcapes, and to pay the high-ſheriff out of the profits of the office 400*l.* It was inſiſted for the plaintiff, that the bond was void by the ſtatute againſt farming the office. And for the defendant, that it was the plaintiff's own agreement to pay it out of the profits, and the under-ſheriff was but his ſubſtitute; for if the profits did not extend to 400*l.* he was not to pay ſo much, but to be accountable; and if they amounted to more, the defendant had no power to call him to account for more than the 400*l.* only. Beſides the ſtatute was not penal, nor inflicted any forfeiture or other puniſhment on the ſheriff, if he had farmed the office. *Finch* C. was of opinion ſeemingly, that the 400*l.* ought to be paid; but referred it to a trial at law in the next county whether he was to have the 400*l.* or no. 2 *Chan. Caſ.* 48.

Bond for diſcharge of all eſcapes.

A bond made by the under-ſheriff to the ſheriff, for diſcharge of all eſcapes, is good: for ſince he transfers his authority to him, it is reaſonable he ſhould take ſecurity of him to perform; and there is nothing intended againſt law, but rather to prevent than connive at eſcapes. *Brownl.* 65, 81.

Eſcape, though after the year, a breach of covenant.

High-ſheriff brought action of covenant againſt the under-ſheriff, and alledged, he was ſheriff *anno* 1658. and that one *W.* was then taken, and ſuffered to eſcape out of his cuſtody; whereupon *J. S.* recovered againſt him, and therein it was alledged, that the plaintiff, 12 *Car.* 2. ſuffered him to eſcape out of his cuſtody; it is well enough; and any eſcape, though after the year, would be a breach of covenant. 2 *Keb. Rep.* 352. *pl.* 43.

The high-ſheriff brought an action againſt the under-ſheriff, who pleaded he ſaved the high-ſheriff harmleſs. Plaintiff demurred, and the plea adjudged ill; for he may ſave him harmleſs in many things, and yet the plaintiff may be damnified in ſome other; he ought to have pleaded *non dampnificatus*. 4 *Bac. Abr.* 439. 19 *Vin. Abr.* 447. *pl.* 1.

See appendix N° 1. *p.* 541. indenture of covenants between the high ſheriff and under-ſheriff.

See

See *id.* N° 2. *p.* 562. bond from the under-ſheriff of *Middleſex* to the high-ſheriff.
See *id.* N° 3. *p.* 564. appointment of the ſheriff of *Middleſex*'s clerks.

CHAP. XXI.

Members of Parliament.

Proclamation to be made.

AT the next county-court, after delivery of the king's writ to the ſheriff, for the electing parliament men, proclamation ſhall be made by the ſheriff in full county, of the day and place of parliament, and all they who are preſent ſhall attend, and in full county proceed to the election of their knights for the ſame county; and after they are choſen, the names of the perſons choſen ſhall be written in an indenture under the ſeals of the electors, and tacked to the ſaid writ of parliament. *Stat.* 7 *H.* 4. *c.* 15.

Upon any return contrary to this ſtatute of 8 *H.* 6. *c.* 7. the ſheriff ſhall forfeit 100 *l.* to the king, and have one year's impriſonment; and ſhall forfeit another 100 *l.* to the perſon choſen knight of the ſhire, and not duly returned. The chuſers muſt have 40 *s.* *per Annum* freehold within the ſaid county.

Falſe return of member of parliament.

The plaintiff brought an action againſt the defendant for a falſe return of a Member of parliament, inſtead of the plaintiff who was duly elected; and for that no determination in parliament was alledged by the plaintiff, or found in the ſpecial verdict, judgment was given for the defendant. *Lutw.* 82.

A sheriff shall not take advantage of his own irregularity to excuse himself in an action.

Action for a false return of a citizen to serve for the city of *Coventry*, and several exceptions were taken after a verdict to the declaration.

First, that the declaration mentions, that the writ issued out of *Chancery* (*recitando*), *&c.* and after the recital, then it says *præcepit*, *&c.* and so there does not appear any nominative case to the word *præcipit*. *Sed non allocatur*; for the king is before mentioned, and shall be the nominative case to the verb *præcepit*; so in a *præcipe quod reddat*, *præcipe* A. *quod reddat* B. 101. *quas ei debet et injuste detinet ut dicit*; there is no nominative case, yet it is good *Latin*; and *A.* shall be the nominative case to the words *reddat* and *debet*, and *B.* is the nominative case to the word *dicit*; so in pleading, *et hoc paratus est verificare, unde petit judicium & dampna sua, &c.* no nominative case appears to the words *paratus est & petit*.

Other exceptions were taken to the declaration, for that the plaintiff had set forth the proceeding of the sheriff in his election, by which it appears that the sheriff did not proceed regularly to an election, and therefore there was no election, and then no action can be for a false return. *Sed non allocatur*; for the sheriff shall not take advantage of his own irregular proceeding to excuse himself from an action. But by *Holt* C. J. it was sufficient for the plaintiff in this case to have said, that such a writ issued, and was delivered to the sheriff, upon which he proceeded to an election *secundum exigentiam brevis*, and that the plaintiff was *debito modo* elected. *Com. Rep.* 132.

The choice must be between 8 and 11 of the clock in the forenoon.

Warrants to be made out to mayors, bailiffs, *&c.*

Every sheriff, after receipt of the king's writ for electing knights of parliament, ought forthwith to make out his warrants under the seal of his office, to every mayor and bailiff of cities and boroughs within the county; reciting in his said warrants the writ of parliament, commanding them thereby to chuse citizens and burgesses to come to the parliament;

liament; *(ſcil.)* if it be a city, to chuſe citizens for the ſame city by citizens; and if it be a borough, to chuſe burgeſſes by burgeſſes (or freemen of the ſame borough.) And thoſe mayors and bailiffs muſt make a lawful return of that precept to the ſheriff, by indentures made between them and their ſheriff of their election, and of their names which are elected, 23 *H.* 6. 15. and the ſheriff muſt ſet his hand and ſeal of office to one part of the indentures, and then deliver it to them to be kept; and to the other part the mayor, or citizens or burgeſſes muſt ſet their hands and ſeals, and deliver it as their deeds to the ſheriff, to be certified and returned by him with the writ of ſummons to the clerk of the crown; and all this under pain of 100*l.* to the king, and impriſonment for one year; and the party grieved (or other perſon in his default) ſhall recover another 100*l.* but they muſt commence their action within three months after the commencement of the parliament; and mayor and bailiffs ſhall pay 40*l.* *Dy.* 113. *pl.* 118.

To be lawfully returned by indentures.

Penalty.

Action.

Action on the caſe lies againſt a ſheriff for returning other knights for the county than were elected; and it is againſt the ſtatute of 7 *H.* 4. for falſe return, and 23 *H.* 6. *c.* 15. gives debt in the caſe; and it is not in the negative, and ſo does not exclude from other remedy. 2 *Sid.* 168.

Caſe againſt a ſheriff.

See append. N° 11. *p.* 597. writ for new election of one citizen for the city of *Weſtminſter*.

See *id.* N°. 12. *p.* 599. precept from Sheriff of *M.* to the bailiff of *W.* for the election.

See *id.* N° 13. *p.* 600. the indenture of election.

CHAP. XXII

Sheriff's Accounts.

Fees to be paid by ſheriffs.

"THE officers of the *Chancery* and *Exchequer*, the auditors and receivers of the crown revenue in *Wales*, and all other officers claiming any fee from ſheriffs or under-ſheriffs, for making out their patents, or the *Dedimus* for ſwearing them, and for entering their recognizance, or for writing out and return of their proceſs, or for their appoſals, or caſting out of court, or for paſſing their accounts, or for making their *Quietus*, or for any other matter, may take the fees in the ſchedule in this act ſpecified, but ſhall not take any greater fee, on penalty of 5 *l.* and treble the ſum taken, with treble coſts to the party grieved; all which ſhall be awarded by the court of *Exchequer*, on complaint and proof thereof before the barons, in ſuch ſummary way as ſhall ſeem meet." 3 *Geo.* *c.* 15. *ſect.* 1.

For ſettling profers, *&c.*

"The commiſſioners of the treaſury, the chancellor and chief baron of the *Exchequer*, and the other barons, or any two of them, ſhall at the requeſt of any ſheriff, or as often as they ſhall think fit, call before them the treaſurer's remembrancer, the clerk of the pipe, or their deputies, ſecondaries, and ſuch other officers as they ſhall think fit, and cauſe them to bring an account of all the rents and certainties written out yearly in proceſſes to the ſheriffs to levy for the crown; and may alter or eſtabliſh the ſums wherewith the ſheriff ſtands charged on the rolls of profers, to ſuch ſums as ſhall ſeem juſt; and orders ſhall be drawn up purſuant thereto, and entered on record in the offices of the king's remembrancer, the treaſurer's remembrancer, and the clerk of the pipe, before the laſt day of *Michaelmas* term then following; and the ſums ſo ſettled ſhall be the profers of each county, and the

rolls of profers ſhall be made conformable thereto." *Ibid. ſect.* 2.

Rewards for convictions to be repaid immediately.

" No ſheriff ſhall be obliged to charge in his accounts any money to be paid as rewards on the conviction of highwaymen, clippers, coiners or houſebreakers, but may immediately apply for the ſame to the treaſury: who, on a certificate of the conviction of any offender, for which ſuch reward ſhall be ordered to be paid by the ſheriffs (by virtue of the acts 4 & 5 *W.* & *M. c.* 8. 6 & 7 *W.* 3. *c.* 17. and 5 *Ann. c.* 31.) together with the acquittances of the parties intitled to receive the rewards, ſhall forthwith repay to ſuch ſheriffs the money ſo diſburſed without fee." *Ibid. ſect.* 4.

To be attached only by writ or warrant of a baron.

" No ſheriff or under-ſheriff ſhall be attached for not being appoſed on any writ or proceſs, or for any neglect or contempt relating to his accounts, but by writ under ſeal of the court of *Exchequer*, or by warrant ſigned by one of the barons, and to be executed by the marſhal or his deputy; in which warrant the name of ſuch ſheriff or under-ſheriff ſhall be inſerted, and his offence ſpecified." *Ibid. ſect.* 5.

Accounts to be paſſed without delay.

" If any perſon, concerned in paſſing of ſheriff's accounts, ſhall retard any ſheriff, or by wilful neglect or abſence prevent any ſheriff from being appoſed or caſt out of court in due time, or after tender of his fees ſhall refuſe to inrol, ſign and deliver his *quietus* in due time, he ſhall make ſuch recompence to the party grieved as ſhall be decreed by the barons, on complaint to them made, in ſuch ſummary way as they ſhall think fit. *Ibid. ſect.* 6.

Surpluſage to be paid without record.

" If any ſheriff of any county in *England* (except the counties palatine of *Cheſter*, *Durham* and *Lancaſter*, and the ſeveral counties of *Wales*, which do not paſs their accounts before the clerk of the pipe) ſhall be in ſurpluſage on his account by reaſon of any diſburſements for the ſervice of the crown (other than the rewards of 40 *l.* for the apprehending highwaymen, &c.) he ſhall not be obliged to take out a record of ſurpluſage, but may apply to the treaſury, who are required to pay the ſame, on the

the ſheriff's producing a certificate of ſuch ſurpluſage from the clerk of the pipe." *Ibid. ſect.* 7.

Sheriffs of *Wales* to account before the auditor.

" The ſheriffs of *Wales* ſhall not be compelled to appear to be appoſed in the *Exchequer*, but ſhall be appoſed before his majeſty's auditor in *Wales*; and the *quietus* of the ſaid ſheriffs, under the auditor's hand ſhall be a ſufficient diſcharge." *Ibid. ſect.* 22.

Counties palatine.

" The auditors of *Cheſter*, *Lancaſter* and *Durham*, ſhall ſtate the accounts of the ſheriffs of the ſaid counties, and appoſe them touching the execution of the king's proceſs; and the ſaid ſheriffs, on ſuch accounts may ſue forth their *quietus eſt* from the ſaid auditors, according to ancient uſage." *Ibid. ſect.* 23.

City of *Cheſter*.

" The ſheriff of the city of *Cheſter* ſhall account as formerly before the mayor, touching all matters granted from the crown to the city by charters." *Ibid. ſect.* 24.

" The ſheriffs of the city of *Cheſter*, as for all other matters not granted to the city, and for which the ſheriffs are accountable to his majeſty, ſhall account for the ſame before, and be appoſed by, and obtain their *quietus eſt* from, the auditor of the county of *Cheſter*, in the ſame manner as the ſheriffs of the county of *Cheſter*." *Ibid.* 25.

Yearly allowance to the ſheriffs for paſſing their accounts.

" The yearly ſum of 4000 *l.* ſhall be ſet apart in the *Exchequer* out of ſuch fund as by any act of this ſeſſion ſhall be charged with the ſame, (*viz.* out of the aggregate fund) for the uſes hereafter mentioned." Stat. 3 *Geo. c.* 16. *ſect.* 1.

" There ſhall be paid yearly out of the ſaid monies, on the *firſt* day of *Michaelmas* term, to the ſheriffs of the ſeveral counties after mentioned, the ſums herein expreſſed, to enable them to bear the expences of the letters patents for their offices and to paſs their accounts, and to obtain their *quietus*; the ſaid yearly ſums to be received without any account or impreſt to be ſet upon them, and without paying any fees for the ſame, *viz.*

To

To the ſheriff of the county of

	l.	s.
Bedford	93	6
Berks	96	0
Bucks	96	0
Cambridge and Huntington	95	10
Cheſter	62	5
Cornwall	102	16
Cumberland	90	2
Derby	93	19
Devon	106	9
Dorſet	101	6
Eſſex	108	10
Glouceſter	98	10
Hereford	94	6
Hertford	93	0
Kent	108	10
Lancaſter	67	7
Leiceſter	94	6
Lincoln	101	3
Middleſex	119	3
Monmouth	89	3
Norfolk	101	15
Northampton	96	0
Northumberland	91	0
Nottingham	95	13
Oxon	97	7
Rutland	69	11
Salop	98	3
Somerſet	112	19
Southampton	101	3
Stafford	95	10
Suffolk	102	12
Surry	90	2
Suſſex	90	5
Warwick	93	10
Wilts	104	10
Worceſter	98	3
York	150	0
Angleſey	30	0

Brecon

	l.	s.
Brecon	30	0
Cardigan	30	0
Carmarthen	30	0
Carnarvon	30	0
Denbigh	30	0
Flint	30	0
Glamorgan	30	0
Merioneth	30	0
Montgomery	30	0
Pembroke	30	0
Radnor	30	0
Weſtmorland	40	6

APPENDIX.

APPENDIX.

N°. I.

Indenture of covenants between the high-ſheriff and under-ſheriff.

THIS indenture made the Day of in the year of the reign of our ſovereign lord *George* the third, by the grace of God, of *Great Britain*, *France*, and *Ireland*, king, defender of the faith, and ſo forth; and in the year of our lord 17 between the right worſhipful *C. A.* and *R. G.* Eſquires, two of the aldermen of the city of *London*, of the one part, and *J. R.* of *London*, gentleman, and *C. B.* of *London*, gentleman, of the other part, **Witneſſeth**, That they the ſaid *C. A.* and *R. G.* being elected and choſen, and having on the day of the date hereof taken the office of ſheriff of the county of *M.* for the whole year, commencing from the day of the date hereof; in conſideration of the aſſured hope and truſt which they the ſaid *C. A.* and *R. G.* have, that the ſaid *J. R.* and *C. B.* will take care that the office of under-ſheriff be honeſtly, uprightly, duly and ſufficiently diſcharged within the ſaid county of *M.* and that the ſaid ſheriff ſhall be freed and diſcharged from all charges and damages whatſoever relating to the ſaid office; and for the conſiderations hereafter in theſe preſents mentioned, they the ſaid *C. A.* and *R. G.* have been pleaſed and contented to depute, ordain, conſtitute and make the ſaid *J. R.* and *C. B.* to be their under-ſheriff of the ſaid county of *M.* for the ſame time and term, and ſo long as they or either of

of them ſhall continue in the ſaid office; but nevertheleſs, ſo as that the ſaid office of under-ſheriff ſhall be executed by and with the joint concurrence and direction of them the ſaid *J. R.* and *C. B.* and not otherwiſe, and alſo ſubject to the proviſo or power herein after mentioned of diſplacing or removing the ſaid *J. R.* and *C. B.* from the ſaid office of under-ſheriff, as herein after is mentioned. And the ſaid *C. A.* and *R. G.* the more effectually to empower the ſaid *J. R.* with the concurrence of the ſaid *C. B.* as aforeſaid, to execute the ſaid office of under-ſheriff of the ſaid county of *M. have*, and each of them *hath* (as much as in them lieth, and they lawfully may) authorized, conſtituted, deputed, and appointed, and *do*, and each of them *doth*, authorize, conſtitute, depute, and appoint him the ſaid *J. R.* and all and every ſuch clerk and clerks as he the ſaid *J. R.* with ſuch concurrence as aforeſaid, ſhall employ and appoint in the ſaid office of under-ſheriff, by writing, under the hand and ſeal of the ſaid *J. R.* in the name of them the ſaid *C. A.* and *R. G.* as ſheriff of the ſaid county of *M.* upon the requeſt of any plaintiff or plaintiffs to ſign, ſeal, execute, and as their act and deed deliver; and every aſſignment and aſſignments of any bail-bond and bail-bonds, that ſhall or may, at any time or times hereafter, during their ſheriffalty, be taken in their names as ſheriff of the ſaid county of *M.* from any defendant or defendants, by virtue of any writ, precept or precepts, or mandate whatſoever, which ſhall be directed to them for the execution thereof; *and alſo* for ſuch deputy or deputies to take any inquiſitions requiſite on all proceſs requiring the ſame, and as ſhall be directed to the ſheriff of the county of *M.* during the ſheriffalty of the ſaid *C. A.* and *R. G.* in conſideration whereof, and for other good cauſes and conſiderations, them thereunto moving, they the ſaid *J. R.* and *C. B.* for themſelves ſeverally, and for their ſeveral and reſpective heirs, executors, and adminiſtrators, *do*, and each of them *doth*, covenant, promiſe, and grant to, and with the ſaid *C. A.* and *R. G.* reſpectively, and

and their reſpective executors and adminiſtrators, by theſe preſents, in manner following, (that is to ſay) That he the ſaid *J. R.* with ſuch concurrence as aforeſaid, ſhall well and truly, honeſtly and ſufficiently, by and during the ſaid term and time, and ſo long as the ſaid *C. A.* and *R. G.* or either of them, ſhall continue in the ſaid office of ſheriff of the ſaid county of *M.* execute and duly perform the ſame carefully, well, truly and honeſtly demean and behave himſelf therein, and ſhall, during the ſaid time and term, well, truly, honeſtly, and ſufficiently, with ſuch concurrence of the ſaid *C. B.* as aforeſaid, execute, or cauſe and procure to be executed, all and every writ and writs, proceſs and proceſſes, warrant and warrants, precept and precepts, mandate and mandates, directed, or to be directed from our ſovereign Lord the King, his heirs or ſucceſſors, and from and out of all and every or any of his Majeſty's courts at *Weſtminſter*, or any other courts elſwhere, or otherwiſe, or from any commiſſioner or commiſſioners, juſtice or juſtices of the Peace, or other perſon or Perſons, officer or officers, which have or ſhall have authority thereunto, to the ſaid ſheriff of the ſaid county of *M.* which during the ſaid time or term ſhall be or to be executed; and of the ſame and every of them, in all due, fit, and convenient time, ſhall make true and ſufficient returns at the ſeveral days, times, and places, according as the ſaid *C. A.* and *R. G.* by the ſaid writs, proceſſes, warrants, precepts and mandates, or any of them, is or ſhall be required limited, or appointed to return the ſame; and ſhall alſo by and during the ſaid time and term, and at all times afterwards, ſave, keep harmleſs, and indemnified, the ſaid *C. A.* and *R. G.* and each of them, their, and each of their heirs, executors, and adminiſtrators, and their and each of their goods, chattels, lands, tenements, hereditaments, and eſtate and every part and parcel thereof, of and from all manner of action and actions, cauſe and cauſes of actions, ſuits, fines, amerciaments, pains, ſum and ſums of money, penalties, contempts, forfeitures

feitures, judgments, executions, damages, coſts, and loſſes, and of and from all and every other troubles, charges, and incumbrances whatſoever, that ſhall or may happen, ariſe, grow, put unto, or ſhall be aſſeſſed, impoſed, ſet, or taxed upon or againſt the ſaid *C. A.* and *R. G.* or either of them, or upon the ſheriff of *M.* at any time or times, for or by reaſon of the executing, not executing, returning, not returning, or miſ-returning, or the not due returning or executing of any of the ſaid writ or writs, proceſs or proceſſes, mandate or mandates, precept or precepts, warrant or warrants, or by reaſon of any ſuits or diſputes as may hereafter ariſe between the ſaid *J. R.* and *C. B.* or either of their executors or adminiſtrators, and without any trouble, coſts, charges, damages, or expences, therefore to be ſuſtained, incurred or expended by the ſaid *C. A.* and *R. G.* or either of them, their or either of their executors, or adminiſtrators, in, about, for touching or concerning the ſame; *and* ſhall alſo from time to time, and at all times hereafter, give notice unto the ſaid *C. A.* and *R. G.* of all and every writ or writs that ſhall be ſued or brought againſt them, or either of them, that ſhall come to the ſaid *J. R.* and *C. B.* or either of them, their, or either of their deputies, clerks, or ſervants; or whereof the ſaid *J. R.* and *C. B.* or either of them ſhall have notice, and ſhall not appear, or cauſe any appearance to be made or entred, or any common bail to be filed upon any writ or action that ſhall be brought againſt the ſaid *C. A.* and *R. G.* or either of them, without the privity or allowance of them the ſaid *C. A.* and *R. G.* or ſuch of them, againſt whom any ſuch writ ſhall be ſo brought; *and further*, that the ſaid *J. R.* and *C. B.* or either of them, their, or either of their deputy or deputies, clerk or clerks, or any other perſon or perſons for or under them, or either of them, in the name or names of the ſaid *C. A.* and *R. G.* or either of them, ſhall not, at any time or times hereafter, during the ſaid term or terms, make, or cauſe to be made, any return or returns,

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of or to any writ or writs, proceſs or proceſſes, precept or precepts, warrant or warrants, mandate or mandates, whatſoever, touching, or in any wiſe concerning, the liberties or franchiſes of the city of *London*, in the name or names of the ſaid *C. A.* and *R. G.* as ſheriff of the ſaid county of *M.* without timely acquainting them the ſaid *C. A.* and *R. G.* therewith, and taking and purſuing their juſt and lawful directions therein; if they, upon or after ſuch Notice, in due time, give ſuch directions therein; *and alſo*, that they the ſaid *J. R.* and *C. B.* or one of them, their, or one of their executors or adminiſtrators, ſhall and will, at all times hereafter, acquit and diſcharge, or otherwiſe well and ſufficiently ſave, keep harmleſs and indemnified the ſaid *C. A.* and *R. G.* and each of them, their, and each of their heirs, executors, and adminiſtrators, and their, and each of their goods and chattels, lands, tenements, and eſtates, of and from all and every ſuits, charges, loſſes, payments, damages, fines, amerciaments, and hindrances whatſoever, that ſhall or may, at any time or times, during the ſaid time they ſhall continue in the ſaid office, or at any time then after ariſe, happen, grow, or come unto, or be brought againſt them the ſaid *C. A.* and *R. G.* or either of them, their, or either of their heirs, executors, or adminiſtrators goods, chattels, lands, or tenements, for or by reaſon of any reſcue or reſcues, eſcape or eſcapes, or letting any priſoner or priſoners, voluntarily, or negligently, or otherwiſe, to go at large or eſcape, or for not taking ſufficient bond or bonds, with ſufficient and good ſecurity; or for Perſons arreſted or to be arreſted; or of or for priſoners bailable; or of refuſing to accept of bond or bonds, in ſuch manner as by law is or ſhall, during the Sheriffalty of the ſaid *C. A.* and *R. G.* be required of any perſon or perſons arreſted, or to be arreſted for any matters or cauſes, for which he, ſhe, or they, ſhall or ſhould be bailed by law; or for the making, or making amiſs, or not due making of all or any aſſignment, of all or any bail-bond or

bail-bonds; or for not putting any warrant or warrants of attorney in any of the courts of record at *Weſtminſter*, or elſewhere; or for or by reaſon of any negligence, miſ-feazance or miſ-feazances, non-feazance or non-feazances, abuſes, miſdemeanors, Commiſſion or Commiſſions, omiſſion or omiſſions, default, delay, or contempt; or for or by reaſon of any other matter, cauſe, or thing, that ſhould or ought, at any time, in any kind whatſoever, to be done or performed by the ſaid *J. R.* and *C. B.* or either of them, as under-ſheriff of the ſaid county of *M.* or by their, or either of their deputy or deputies, clerk or clerks, bailiff or bailiffs, ſervant or Servants, or by reaſon of his or their, or any of their not-doing, inſufficient doing, over-doing, or neglecting, his or their duty or duties; or for or in reſpect of any matter, cauſe, or thing whatſoever, hereafter to be done, or omitted to be done, by him, them, or any of them, concerning the ſaid office: *and moreover*, that they the ſaid *J. R.* and *C. B.* or one of them, ſhall from time to time, and at all times, when thereunto required, as ſoon as conveniently may be, during the ſaid time and term, and until the ſaid *C. A.* and *R. G.* ſhall be duly diſcharged from the ſaid office of ſheriff, deliver, or cauſe to be delivered, unto the ſaid *C. A.* and *R. G.* or one of them, a true account or inventory, in writing, of all extents, and judicial writs or proceſs whatſoever, that ſhall come to the hands of the ſaid *J. R.* and *C. B.* or either of them, or of their, or either of their agent or agents, clerk or clerks, deputy or deputies, or any perſon or perſons appointed to act for, by, or under them, or any of them, to be executed with the teſte and return of the ſame, and the ſums of money therein ſpecified, and the name or names of the Perſon or Perſons againſt whom ſuch writ or writs, proceſs or proceſſes, ſhall be iſſued; and the perſon or perſons for whom all and every, or any ſuch writ or writs, proceſs or proceſſes, ſhall be iſſued, and what is done upon all and every, or any ſuch writ or writs, proceſs or

or proceſſes; *and* that they the ſaid *J. R.* and *C. B.* or one of them, ſhall and will, within the ſpace of ten days next after any levy or receipt by them, or either of them, or their, or either of their deputies, ſhall be made of any ſum or ſums of money, upon or by virtue of ſuch extents or judicial writs, proceſs or proceſſes, if thereto required, pay, or cauſe to be paid, the ſaid ſum or ſums of money to the ſaid *C. A.* and *R. G.* or one of them, or to ſuch perſon or perſons as they ſhall from time to time nominate and appoint to receive the ſame; they the ſaid *C. A.* and *R. G.* or one of them, giving a note or receipt in writing under his or their hand or hands, teſtifying the receipt of all ſuch ſum or ſums of money as ſhall be by them, or either of them, ſo received: *and*, that it ſhall be in the power of the ſaid *C. A.* and *R. G.* notwithſtanding any thing in theſe preſents contained, upon complaint to them made of the miſcarriage of any bailiff, within the ſaid county of *M.* in the duty of his place, to put out, diſcharge and diſplace any ſuch bailiff from his further employment as bailiff, for ſo much of the ſaid time as ſhall be then to come: *and* likewiſe, that the ſaid *J. R.* and *C. B.* or one of them, ſhall and will, from time to time and at all times hereafter, give due notice to the ſaid *C. A.* and *R. G.* of all ſuch perſonal attendances as ſhall from time to time be required, or requiſite to be made by the ſaid *C. A.* and *R. G.* or either of them, in the county of *M.* as ſheriff of the ſaid county, and be attending upon and aſſiſting to the ſaid Sheriff, wherein ſuch perſonal attendance ſhall be required; and that they the ſaid *J. R.* and *C. B.* and each of them, ſhall be aiding and aſſiſting in the raiſing and levying ſuch force of men, horſes, and arms, within the ſaid county of *M.* as the ſaid *C. A.* and *R. G.* ſhall be enjoined to raiſe, and levy; and ſhall from time to time, and at all times, as occaſion ſhall be and require, give their perſonal attendance on the ſaid *C. A.* and *R. G.* and each of them, for their doing and performing, and executing of all ſuch thing and things as ſhall be

requiſite on their behalf: *and further*, that the ſaid *J. R.* and *C. B.* ſhall, during the ſaid term and time, well, truly, and faithfully, do, execute and perform all and every act and acts, matters, thing and things whatſoever, incident or belonging to the ſaid office of under-ſheriff of the ſaid county of *M.* and to the utmoſt and beſt of their means, ſkill and power, ſhall and will well and truly levy, collect, and gather all and ſingular ſuch ſum and ſums of money as do in any wiſe concern or belong to the ſaid ſheriffalty, or ſheriff of the ſaid county of *M.* and alſo all poſt-fines *pro licentia concordandi*, forfeitures, profits, ſeizures, fee-farm rents, pipe ſilver, exchequer ſilver, extracts of all goods of traitors, felonious perſons, outlaws, and all and every ſuch ſum and ſums of money, forfeitures, entries, and demands whatſoever, as ſhall be at any time or times extracted, charged, or impoſed for the uſe of our ſovereign Lord the King, his heirs and ſucceſſors, or for or by reaſon of any extracts of writs, proceſs of Green wax, or otherwiſe, directed out of the court of exchequer, or crown office, or any of the courts of record at *Weſtminſter*, or elſewhere, and commanded, directed, or appointed to be levied or gathered by the ſaid ſheriff of the ſaid county of *M.* and of the ſame, and every of them, and every part thereof, ſhall in due time, from time to time, make a true and juſt account, and due ſatisfaction and payment thereof, to the uſe of our ſovereign Lord the King, his heirs and ſucceſſors, into the receipt of the exchequer, by tally or tallies, in due form, or into ſuch other courts as the caſe ſhall require; *and alſo* ſhall take of the pell office a conſtat of every ſuch payment and tally ſtruck; and ſhall likewiſe take out and obtain all other acquittances, meet and neceſſary for the manifeſtation of any ſuch payment as the caſe ſhall require, and all and every ſuch conſtats and acquittances ſhall and will from time to time deliver to the ſaid *C. A.* and *R. G.* or one of them, within ſix days after

every

every or any ſuch payment made, if thereunto required; *and* ſhall alſo from time to time from thenceforth keep harmleſs and indemnified the ſaid *C. A.* and *R. G.* and each of them, their, and each of their heirs, executors and adminiſtrators, and their, and each of their goods, chattels, lands, tenements and eſtate, from and againſt our ſaid ſovereign Lord the King, his heirs and ſucceſſors, in reſpect of all and every ſum and ſums of money to be had, levied, or received by the ſaid *J. R.* and *C. B.* or either of them, for the uſe of our ſovereign Lord the King, his heirs or ſucceſſors, or which ought to be had, levied, or received by him the ſaid *J. R.* as under-ſheriff, or by the ſaid *C. A.* and *R. G.* as ſheriff of the ſaid county of *M.* to and for the uſe of our ſaid ſovereign Lord the King, his heirs or ſucceſſors: *and moreover*, that the ſaid *J. R.* and *C. B.* or one of them, their, or one of their executors, adminiſtrators, or aſſigns, ſhall and will, at his or their own proper coſts and charges, in and by all things join with the ſecondaries for the time being, for both the compters in *London*, and with all other clerks appointed or to be appointed by the ſaid *C. A.* and *R. G.* as ſheriffs of the city of *London*, for the ſupplying the ſaid office of under-ſheriffs of *London*, commonly called by the names of ſecondaries of the compters of *London*, or the ſheriffs clerks, for the orderly and duly proceeding for the paſſing the accounts for *London* and *Middleſex*, in one account, agreeable to the ſtatute or ſtatutes in that caſe made and provided, touching ſheriffs accounts; *and* ſhall and will, without delay, jointly proceed in the ſaid accounts, in one, as well in the particulars thereof, with the auditor or auditors aſſigned to take the ſaid accounts, as alſo in paſſing thereof in one, by the like agreement and conſent, and alſo in the declarations thereof before the barons of the ſaid court of exchequer, and before any other perſon or perſons to be thereunto authorized, and being ready for the declaration thereof, ſhall alſo, at the like

proper coſts and charges of the ſaid *J. R.* and *C. B.* or one of them, procure the ſaid auditor and auditors to attend ſome or one of the barons to take the ſaid declaration, and to make the uſual allowances of the ſaid accounts, for ſo much thereof as appertains to the ſaid ſheriff or county of *M.* and alſo ſubſcribe the whole accounts of *London* and *Middleſex*, and the duplicate thereof, to the end that one part thereof, which ſhall be the charge remaining with our ſovereign Lord the King, and the lord treaſurer, and commiſſioners of the treaſury, and remembrancer of the exchequer, may be anſwered with the other part and duplicate thereof, ſubſcribed by ſome of the officers of the exchequer for the ſaid ſheriff; all which ſhall be ſolicited and followed, to be got, and ſhall be got, finiſhed, and effectually perfected, by the ſaid *J. R.* and *C. B.* or one of them, at their or one of their own proper coſts and charges, for ſo much thereof as ſhall concern the ſaid county of *M.* and in all offices and places through which the ſame ought duly to paſs; and that the ſame ſhall be performed and done with due ſpeed, and without delay and unneceſſary intermiſſion, and ſhall be done and brought to the pipe office in that due time and manner which the ſtatute hath ordained concerning ſheriffs accounts, as by the ſtatute or ſtatutes in that behalf is limited and appointed; and likewiſe be diſpatched from the pipe office with convenient expedition; and on or before the Day of which ſhall be in the year of our Lord 17 procure ſufficient diſcharge, and formal *quietus eſt*, in due form of law, at the proper coſts and charges of the ſaid *J. R.* and *C. B.* or one of them, for ſo much of the ſaid account as ſhall concern the ſaid *C. A.* and *R. G.* as ſheriff of the county of *M.* as aforeſaid, their heirs, executors, or adminiſtrators, and every of them; ſo that their, and each of their lands, tenements, goods, chattels, and eſtate, may at all times thereafter ſtand free and clear from all damages, charges, and accounts, for or by reaſon of the ſaid office or

place

place of ſheriff of the ſaid county of *M. and further*, that the ſaid *J. R.* and *C. B.* or one of them, at their, or one of their own proper coſts and charges, ſhall defray, bear, pay, and lay out all ſuch charges of what nature ſoever, as have been heretofore laid out by any under-ſheriff of the ſaid county of *M.* at the ſeſſions held at the *Old Baily*, within the city of *London*; *and* ſhall alſo, at their, or one of their own proper coſts and charges, defray, bear, and lay forth all charges whatſoever, which are or ſhall be expended at the ſeveral ſeſſions held in the ſaid county of *M.* at any time or times during the ſaid time or term, for which the ſaid *C. A.* and *R. G.* or either of them, ſhall continue to be ſheriff of the ſaid county of *M. and* ſhall and will freely diſcharge and ſave harmleſs the ſaid *C. A.* and *R. G.* and each of them, their, and each of their heirs, executors, and adminiſtrators, of and from the ſame: *and further*, that the ſaid *J. R.* and *C. B.* or one of them, ſhall at their, or one of their own proper coſts and charges, defray, bear, pay, and lay forth all charges and other expences whatſoever, that are or ought to be laid forth or diſburſed, in, for, or about the executing or puniſhing all and every traitors and felons, and all other perſons whatſoever, that are or ſhall be condemned or attainted for treaſon, felony, and Perſons adjudged to be whipt, ſet upon the pillory, or otherwiſe puniſhed according to law, whereſoever or howſoever in the ſaid county of *M.* and of ſuch priſoners, as ſhall be from time to time convicted and attainted, ſhall and will make, or cauſe to be made, due execution according to the Judgment or Sentence againſt every of them to be pronounced, at any time or times, during the ſaid term or time: *and alſo*, that the ſaid *J. R.* and *C. B.* or either of them, their, or either of their deputy or deputies, clerk or clerks, bailiff or bailiffs, or any other officer or officers that ſhall be employed, retained, admitted, appointed, or permitted by or under the ſaid *J. R.* and *C. B.* or either of them, at any time or times, during the ſaid term or time, ſhall

not, without the ſpecial conſent of the ſaid *C. A.* and *R. G.* in that behalf obtained in writing under their hands, detain or keep above the ſpace of forty-eight hours, in their or any of their cuſtody, houſe, room, or chamber, or in any other houſe, room, chamber, or place whatſoever, any priſoner or priſoners, by him or them, or any of them arreſted, or to be arreſted, or taken within the ſaid County of *M.* for any debt, damages, fine, ſuit, or cauſe, for above the value of 20*l.* of lawful money of *Great Britain*, or for ſeveral or any cauſe or cauſes together, exceeding the ſaid ſum of 20*l.* but the ſame priſoners, and every of them ſo arreſted and taken, for above the ſaid ſum of 20*l.* ſhall forthwith, and without delay, commit, or cauſe to be committed, to the gaol or priſon of *Newgate*, or one other common gaol or priſon, appointed or to be appointed for ſuch purpoſe, for the ſaid county of *M.* there to remain until ſuch priſoner or priſoners ſhall be diſcharged by due courſe of law, or ſhall otherwiſe be let to bail, all and every ſuch priſoner and priſoners, upon good and ſufficient ſecurities and bail, according to the form of the ſtatute in that caſe made, if ſo be the law ſhall require and warrant the ſaid ſheriff, or the under-ſheriff of the ſaid county of *M.* to let to bail any ſuch priſoner or priſoners, and not otherwiſe; and that he the ſaid *J. R.* with the concurrence and aſſiſtance of the ſaid *C. B.* as aforeſaid, ſhall and will well, truly, faithfully, providently, circumſpectly, and diligently, do, perform, execute and accompliſh all and ſingular acts, matters, and things which to the ſaid office of ſheriff or under-ſheriff of the ſaid county of *M.* during the ſaid term and time that they the ſaid *C. A.* and *R. G.* ſhall continue in the ſaid office, do or ſhall appertain and belong, or ought to be by the ſaid ſheriff or under-ſheriff performed and accompliſhed; *and alſo*, that the ſaid *J. R.* and *C. B.* and all and every of the bailiffs, clerks, ſervants, and miniſters, that ſhall be employed by or under them, or either of them, in the execution of the ſaid office, to the utmoſt of his and their, and

every

every of their power, and as much as in them or any of them is or ſhall be, all and ſingular the liberties and franchiſes to the ſaid mayor, commonalty, and citizens of the city of *London*, and to the ſaid *C. A.* and *R. G.* as ſheriffs of *London*, or ſheriff of the county of *M.* belonging or appertaining, ſhall and will well and truly obſerve, perform, maintain and keep, in all places within the ſaid county of *M.* and ſhall not, ſo far as in the power of the ſaid *J. R.* and *C. B.* or either of them, ſhall lie, permit, or ſuffer the ſaid liberties and franchiſes, or any of them, to be broken, infringed, or violated in anywiſe: *and further*, that they the ſaid *J. R.* and *C. B.* or one of them, ſhall and will duly and juſtly perform, execute and keep all ſuch articles and matters whatſoever, as are contained, mentioned and expreſſed in the condition of the bond or recognizance, which the ſaid *C. A.* and *R. G.* or either of them with ſureties, have or hath, or ſhall enter into and acknowledge to the uſe of our ſovereign Lord the King, in his majeſty's court of exchequer, concerning the ſaid office of ſheriff of *M.* ſave only ſuch as do neceſſarily require the perſonal attendance of the ſaid *C. A.* and *R. G.* or either of them; and the ſaid *C. A.* and *R. G. do* covenant, promiſe and grant, by theſe preſents, for themſelves and each of them ſeverally, and for their and each of their ſeveral heirs, executors and adminiſtrators, to and with the ſaid *J. R.* and *C. B.* their executors and adminiſtrators, that all and every the covenant and covenants, obligations, taken or to be taken, in the names of the ſaid *C. A.* and *R. G.* as ſheriff of the ſaid county of *M.* either of or from the ſeveral bailiffs in their places, or of or from any perſon or perſons arreſted, or to be arreſted, within the ſaid county of *M.* within the time that they or either of them ſhall continue in the ſaid office, by virtue of any writ, precept or mandate whatſoever, ſo nevertheleſs as the ſaid *C. A.* and *R. G.* and each of them, their, and each of their heirs, executors and adminiſtrators, ſhall be ſecured, kept harmleſs, and indemnified by the ſaid *J. R.* and *C. B.* their heirs, executors

executors and adminiſtrators, for, touching or concerning the ſaid office of ſheriff, ſhall be to the only uſe of the ſaid *J. R.* and *C. B.* their executors and adminiſtrators, for their better ſecurity, and being ſaved harmleſs of and from any damages, loſſes, troubles and expences, that ſhall or may grow, come or happen to them, by reaſon of the miſdemeanors or negligences of any of the ſaid bailiffs, or any other perſon or perſons arreſted, or to be arreſted, or for or by reaſon of his or their non-appearances or otherwiſe howſoever: *and* that they the ſaid *J. R.* and *C. B.* their executors and adminiſtrators, performing the covenants herein contained on their parts to be performed, ſhall and may, at their own proper coſts and charges, ſue the ſaid covenants and obligations in the names of them the ſaid *C. A.* and *R. G.* or the ſurvivor of them, or the executors or adminiſtrators of ſuch ſurvivor of them, by virtue of t eſe preſents, and receive, take, and enjoy, to the proper uſe and behoof of the ſaid *J. R.* and *C. B.* their executors, adminiſtrators and aſſigns, all ſuch lawful benefits and recompences as ſhall ariſe or come upon or by reaſon of the ſaid covenants, obligations and ſuits, and every or any of them, in any manner of wiſe as they the ſaid *C. A.* and *R. G.* or either of them, their, or either of their executors or adminiſtrators might lawfully and equitably have done if theſe preſents had not been made: *provided nevertheleſs*, and ſo that the ſaid *J. R.* and *C. B.* their executors, adminiſtrators and aſſigns, do always indemnify and ſave harmleſs the ſaid *C. A.* and *R. G.* and each of them, their, and each of their heirs, executors and adminiſtrators, and their, and each of their goods, chattels, lands, tenements, and eſtates, of and from all and all manner of coſts, charges, damages, and ſums of money whatſoever, which may in any wiſe be awarded, adjudged, ordered, decreed, or recovered againſt the ſaid *C. A.* and *R. G.* or either of them, their, or either of their heirs, executors or adminiſtrators, by reaſon, means, or occaſion of the putting in ſuit as aforeſaid, any of the aforeſaid

covenants

covenants or obligations by the ſaid under-ſheriff, his executors, adminiſtrators or aſſigns, in the name or names of the ſaid *C. A.* and *R. G.* or either of them, their or either of their executors or adminiſtrators, which they the ſaid *J. R.* and *C. B.* do, and each of them doth, hereby for himſelf ſeverally, and for his reſpective executors and adminiſtrators covenant to do; *and alſo*, that it ſhall and may be lawful to and for the ſaid *J. R.* with ſuch concurrence of the ſaid *C. B.* as aforeſaid, they obſerving and performing the ſaid covenants and agreements herein contained on their parts to be performed, to have and enjoy the ſaid office of under-ſheriff of the ſaid county of *M.* ſubject to the proviſo herein after-mentioned, and to keep all and ſingular courts, tourns, leets and county courts, for the ſaid time, at the times and places duly appointed for the ſame, according to the laws and ſtatutes of this realm, and the cuſtoms and uſages of the county of *M. and* that in ſuch caſes as aforeſaid they the ſaid *C. A.* and *R. G.* as far as they lawfully may, without any breach or infringment of their duty as ſheriff of the ſaid county of *M.* do covenant, promiſe and grant, that the ſaid *J. R.* and *C. B.* ſhall and may have and take all lawful fees, dues, profits, and commodities, that ſhall or may be lawfully had, gotten, received, or become due to the ſaid ſheriff, by virtue or means of the ſaid office of ſheriff of the ſaid county of *M.* to the proper uſe of them the ſaid *J. R.* and *C. B.* without the contradiction or denial of the ſaid *C. A.* and *R. G.* or either of them, their or either of their executors or adminiſtrators, and without any account thereof to them or either of them to be given; *and alſo*, that he the ſaid *J. R.* ſhall and may have, receive and take to and for the proper uſe of the ſaid *J. R.* and *C. B.* (in caſe he the ſaid *J. R.* ſhall be continued in the ſaid office of under-ſheriff of the ſaid county of *M.* during the ſheriffalty of the ſaid *C. A.* and *R. G.* and ſhall duly paſs the accounts of the ſaid *C. A.* and *R. G.* as ſheriffs of the ſaid county, and procure a good and ſufficient diſcharge to them in reſpect thereof

thereof according to the true intent of the covenants herein before in that behalf contained) the ſum of 119*l.* 3*s.* being the allowance for paſſing the accounts of the ſheriff of the county of *M.* made or given to the ſheriff of the ſaid county of *M.* for the time being by an act of parliament made in the third year of the reign of his late majeſty king *George* the firſt, entitled, An act for the better enabling ſheriffs to ſue out their patents, and paſs their accounts; *and* the ſaid *C. A.* and *R. G.* do hereby nominate, conſtitute and appoint the ſaid *J. R.* their lawful attorney for them and in their names, but to the uſe aforeſaid, to receive from the receipt of his majeſty's exchequer, or from ſuch perſon or perſons as ſhall be appointed to pay the ſame, the ſaid ſum of 119*l.* 3*s.* and on receipt thereof, to make, execute and give for them, and in their names, a full and ſufficient diſcharge and receipt for the ſame; they the ſaid *C. A.* and *R. G.* and each of them, their and each of their executors and adminiſtrators, and their and each of their goods, chattels, lands and tenements, being ſaved harmleſs and indemnified from time to time by the ſaid *J. R.* and *C. B.* according to the true intent and meaning of theſe preſents: *and whereas*, it is intended by theſe preſents, that the ſaid *J. R.* and *C. B.* ſhall receive and account for, in the names of the ſaid *C. A.* and *R. G.* as ſheriff of *M.* ſuch of his majeſty's revenue ariſing within the ſaid county of *M.* and during the continuance of him the ſaid *J. R.* in the ſaid office of under-ſheriff, as uſually hath been received by other under-ſheriffs; *and alſo*, that the ſaid *J. R.* and *C. B.* ſhall and they do hereby accordingly agree to lay out and diſburſe for his majeſty's ſervice ſuch monies as heretofore have uſually been paid, laid out and diſburſed by former under-ſheriffs of the ſaid county, whereby the ballance of the account between our Lord the King and the ſaid *C. A.* and *R. G.* (if any ſhould be due from our ſaid Lord the King to the ſaid *C. A.* and *R. G.* as ſheriff of the ſaid county) will of right belong to them the ſaid *J. R.* and *C. B.* wherefore

to

to enable him the ſaid *J. R.* to receive the ballance of the ſaid account, if any ſhall appear to be due to the ſaid *C. A.* and *R. G.* as ſheriff of the ſaid county, they the ſaid *C. A.* and *R. G.* do hereby nominate, conſtitute and appoint him the ſaid *J. R.* their lawful attorney for them the ſaid *C. A.* and *R. G.* and in their names, but to the uſes aforeſaid to receive at the receipt of his majeſties exchequer, from ſuch perſon or perſons who ſhall be appointed to pay the ſame, ſuch ſurplus or ballance of the ſaid account (if ſuch ſhall be due), and on receipt thereof, to make, execute and give, in the names of them the ſaid *C. A.* and *R. G.* a full and ſufficient diſcharge for the ſame. *Provided nevertheleſs*, and it is hereby declared and agreed by and between all the ſaid parties to theſe preſents, and particularly by the ſaid *J. R.* and *C. B.* for themſelves, their heirs, executors and adminiſtrators, that they the ſaid *J. R.* and *C. B.* for themſelves, their heirs, executors and adminiſtrators, ſhall and will well and truly account for, pay and deliver to the ſaid *C. A.* and *R. G.* or one of them, their or one of their executors or adminiſtrators, all ſuch ſum and ſums of money, fees, dues, perquiſites, profits and emoluments whatſoever, which have been heretofore uſually had or received by former ſheriffs of the ſaid county of *M.* and not by the under-ſheriff for the time being; any thing herein before contained to the contrary thereof in any wiſe notwithſtanding. And the ſaid *J. R.* and *C. B.* for themſelves jointly and ſeverally, and for their reſpective heirs, executors and adminiſtrators, do, and each of them doth hereby covenant, promiſe, grant and agree, to and with the ſaid *C. A.* and *R. G.* their executors and adminiſtrators, that they the ſaid *J. R.* and *C. B.* their heirs, executors and adminiſtrators, ſhall and will, from time to time and at all times from henceforth, ſave, keep harmleſs and indemnified them the ſaid *C. A.* and *R. G.* and each of them, their and each of their heirs, executors and adminiſtrators, of and from all and all manner of action and actions, cauſe and

cauſes

cauſes of action and actions, ſuits, troubles, fines, amerciaments, pains, penalties, forfeitures, defaults, and all damages, matters and things whatſoever, relating to the ſaid office of ſheriff of *M.* excepting only what ſhall happen by the perſonal default, negligence or omiſſion of them the ſaid *C. A.* and *R. G.* or either of them, or their or either of their proper acts. *Provided nevertheleſs*, that it ſhall and may be lawful to and for the ſaid *C. A.* and *R. G.* or either of them, at any time or times during their continuing the ſaid *J. R.* in the ſaid office of under-ſheriff, at their or either of their wills and pleaſures to command the ſaid *J. R.* and *C. B.* or either of them, or his or their deputy or deputies clerk or clerks to attend them the ſaid *C. A.* and *R. G.* or either of them, with the freeholders books, wherein the freeholders names of the county of *M.* are or ſhall be inſerted and entered, and that the ſaid *C. A.* and *R. G.* or either of them, at their wills and pleaſures, ſhall from time to time nominate and return ſuch juror and jurors, inqueſt and inqueſts, to be returned and impanelled as jurors to inquire and ſerve in any of his majeſty's court or courts at *Weſtminſter*, or before any of his majeſty's court or courts, commiſſioner or commiſſioners of *oyer* and *terminer*, gaol-delivery, commiſſion of the peace, juſtice or juſtices of the peace, and all and every other perſon and perſons, having lawful authority to command the ſaid *C. A.* and *R. G.* as ſheriff of the ſaid county, to cauſe to come before them, or any of them, any juror or jurors, inqueſt or inqueſts whatſoever, to ſerve for or in the ſaid county, or upon any iſſue whatſoever ariſing to be tried, or any inquiſition to be taken within the ſaid county of *M.* *And* the ſaid *J. R.* and *C. B.* for themſelves, their heirs, executors and adminiſtrators, *do*, and each of them *doth*, covenant and promiſe to and with the ſaid *C. A.* and *R. G.* and each of them, their and each of their executors and adminiſtrators by theſe preſents, that they the ſaid *J. R.* and *C. B.* or one of them, ſhall and will from time to time ingroſs, impanel and return, or cauſe

cauſe to be ingroſſed, impanelled and returned and ſummoned, ſuch juror or jurors, inqueſt and inqueſts, ſo from time to time nominated and appointed to be returned by the ſaid *C. A.* and *R. G.* or either of them, with their names ſubſcribed to ſuch returns, and none other, together with the like proceſs to them directed in that behalf, and ſhall and will always, on notice, attend with the ſaid freeholders book on them the ſaid *C. A.* and *R. G.* or either of them, and permit and ſuffer them to nominate and return ſuch juror and jurors, inqueſt and inqueſts, in manner aforeſaid; any thing in theſe preſents contained to the contrary thereof notwithſtanding. *And further*, that they the ſaid *J. R.* and *C. B.* or either of them, their or either of their deputies, clerks or ſervants, ſhall not at any time or times, during the ſaid time or term which the ſaid *C. A.* and *R. G.* or either of them, ſhall continue to be ſheriff of the ſaid county of *M.* ingroſs, return, impanel, or cauſe to be ingroſſed, returned or impanelled, any inqueſt or jury for the trying any traitor or traitors, without the approbation of the ſaid *C. A.* and *R. G.* firſt had and obtained; *nor* open, execute or return any letters or commandments from the King's majeſty, the privy council, or the ſecretaries of ſtate, directed to the ſheriff of *M.* without firſt giving notice to the ſaid *C. A.* and *R. G.* and taking their directions therein, in caſe they or either of them, at the time of the receipt or delivery of any of the ſaid letters or commandments, ſhall be reſident in the city of *London* and county of *M.* or either of them. *Provided further*, that it ſhall and may be lawful to and for the ſaid *C. A.* and *R. G.* or either of them, at any time or times, during their continuing the ſaid *J. R.* in the ſaid office of under-ſheriff, at their wills and pleaſures to prohibit and forbid the ſaid *J. R.* and *C. B.* or either of them, their or either of their deputy or deputies, clerk or clerks, by a note in writing under their hands, from opening, ſending, executing or returning any writ or writs, precept or mandate, that ſhall be directed to the ſheriff of *M.* for

for the electing any member or members to ſerve in parliament in or for the ſaid county of *M.* to the end the ſaid *C. A.* and *R. G.* or one of them, may perſonally and duly open, ſend, execute and return the ſame; *and* in ſuch caſe the ſaid *J. R.* and *C. B.* for themſelves ſeverally, and for their ſeveral heirs, executors and adminiſtrators, *do*, and each of them *doth*, hereby covenant and promiſe to and with the ſaid *C. A.* and *R. G.* and each of them, their and each of their executors and adminiſtrators, that they the ſaid *J. R.* and *C. B.* will not open, ſend, execute or return any ſuch writ or writs, precept or mandate, without the ſpecial directions of the ſaid *C. A.* and *R. G.* or one of them firſt had and obtained in writing, whereby to hinder or prevent the ſaid *C. A.* and *R. G.* from opening, ſending, returning or executing any ſuch writ or writs in their proper perſons: *Provided always*, and it is the true intent, meaning and agreement of all the ſaid parties to theſe preſents, that if the ſaid *J. R.* or *C. B.* or either of them, ſhall not well, honeſtly and carefully demean and behave themſelves in the ſaid office of under-ſheriff of the ſaid county of *M.* in all buſineſs, matters and things thereunto belonging, to the good liking and approbation of the ſaid *C. A.* and *R. G.* that then and from thenceforth it ſhall and may be lawful to and for the ſaid *C. A.* and *R. G.* or either of them, at any time or times during their or either of their continuance in the ſaid office of ſheriff of the ſaid county of *M.* to diſplace and remove the ſaid *J. R.* and *C. B.* or either of them ſo miſbehaving, out of and from the ſaid place and office of under-ſheriff aforeſaid, for and during all the then reſidue of the ſaid term of the ſaid time and term hereby granted; any thing in this preſent indenture contained, or any other matter whatſoever to the contrary thereof in any wiſe notwithſtanding. *And* the ſaid *J. R.* and *C. B.* for themſelves ſeverally, and for their ſeveral heirs, executors and adminiſtrators, and every of them *do*, and each of them *doth*, covenant, promiſe and agree, to and with the ſaid *C. A.* and *R. G.* their

executors

executors and adminiſtrators by theſe preſents, that in caſe of ſuch diſplacing the ſaid *J. R.* and *C. B.* or either of them as aforeſaid, they the ſaid *J. R.* and *C. B.* or either of them, their or either of their executors and adminiſtrators, after his or their being ſo diſplaced, ſhall not nor will act as under-ſheriff of the ſaid county in any wiſe howſoever during the ſhrievalty of the ſaid *C. A.* and *R. G.* and in caſe of ſuch removal as aforeſaid, they the ſaid *J. R.* and *C. B.* or one of them, ſhall and will deliver unto the ſaid *C. A.* and *R. G.* or one of them, their or one of their executors or adminiſtrators, all and all manner of books belonging or relating to the ſaid office, and all bail-bonds, proceſs and mandates, and other things whatſoever relating to the ſaid office which ſhall then be depending or remaining, or be in the hands, cuſtody or diſpoſal of the ſaid *J. R.* and *C. B.* or either of them, their or either of their clerks, bailiffs or ſervants, unexecuted or not returned, whole, ſafe and uncancelled, and ſhall and will alſo pay and deliver to them the ſaid *C. A.* and *R. G.* or one of them, all ſum and ſums of money, goods and chattels, as ſhall be taken, paid or levied in execution, or for the uſe of the King's majeſty, his heirs or ſucceſſors, by virtue of the ſaid office of ſheriff or under-ſheriff of the ſaid county of *M.* within two days next after requeſt in ſuch behalf ſhall be made by them the ſaid *C. A.* and *R. G.* or either of them, their or either of their heirs, executors and adminiſtrators. *And laſtly*, they the ſaid *J. R.* and *C. B.* for themſelves ſeverally, and for their ſeveral and reſpective heirs, executors and adminiſtrators, *do*, and each of them *doth*, hereby covenant, promiſe and grant to and with the ſaid *C. A.* and *R. G.* and each of them, their and each of their executors and adminiſtrators by theſe preſents, that they the ſaid *J. R.* and *C. B.* or one of them, ſhall and will bear, pay and diſcharge all rewards or ſums of money payable or to be paid by the ſaid ſheriff of *M.* by virtue of any act or acts of parliament already made, or which at any time or times hereafter,

during the ſaid *J. R.*'s continuance in the ſaid office, ſhall be made for apprehending or convicting any perſon or perſons for any felony or robbery commited, or to be committed, on the King's highway, or for any burglary or felonious breaking or entring any houſes, or for counterfeiting, clipping or diminiſhing the coin of this kingdom, or for any other matter or thing, that already is or ſhall be hereafter, for the time and term of his continuing in the ſaid office of under-ſheriff, by any act or acts of parliament impoſed on the ſaid ſheriff of *M.* and indemnify the ſaid *C. A.* and *R. G.* and each of them, their and each of their heirs, executors and adminiſtrators, of and from the ſame. *In witneſs, &c.*

N° II.

Bond from the under-ſheriff of Middleſex *to the high-ſheriff.*

The obligation to be from J. R. *and* C. B. *to* C. A. *and* R. G. *Penalty* 5000 *l.*

WHEREAS our ſovereign Lord *George* the Third, by the grace of God, *&c.* by his letters patent, bearing date, *&c.* did appoint, nominate and make the above named *C. A.* and *R. G.* high-ſheriff of the county of *M.* which ſaid *C. A.* and *R. G.* afterwards by their indenture, bearing date, *&c.* did depute, aſſign, conſtitute and ordain the above-bound *J. R.* and *C. B.* their under-ſheriff of the ſaid county of *M.* as in and by the ſaid indenture more fully and at large it doth and may appear: *Now the condition of this obligation is ſuch,* that if the above-bound *J. R.* and *C. B.* their heirs, executors and adminiſtrators, and every of them, do at all time and times hereafter ſave and keep harmleſs and indemnified, as well the ſaid *C. A.* and *R. G.* their and each of their heirs, executors, adminiſtrators and aſſigns, as alſo the lands, tenements,

nements, hereditaments, goods and chattels of the ſaid *C. A.* and *R. G.* of, for, touching and concerning the returns and executions of all ſuch proceſs, writs and warrants, of what nature ſoever they be, as are or ſhall be directed to the ſheriff of the ſaid county of *M.* and ſhall be brought and delivered, or offered to be delivered to the ſaid *J. R.* and *C. B.* or either of them, during the time that the ſaid *C. A.* and *R. G.* or either of them ſhall be ſheriff of the ſaid county, and of and from all iſſues, fines and amerciaments which ſhall happen to be impoſed or taxed upon the ſaid *C. A.* and *R. G.* or either of them, for and concerning the not executing, wrongful executing, or detaining in their hands any writs, proceſs or warrants, and of, for and concerning all eſcapes of all and every perſon or perſons that ſhall be arreſted or apprehended by virtue of any ſuch proceſs, writ or warrant, during the time that the ſaid *C. A.* and *R. G.* or either of them ſhall continue ſheriff of the ſaid county of *M.* and alſo if the ſaid *J. R. C. B.* and each of them, their and each of their heirs, executors and adminiſtrators, ſhall ſave harmleſs and indemnified the ſaid *C. A.* and *R. G.* and each of them, their and each of their heirs and aſſigns, and their and each of their lands, goods and chattels, of all ſuch account and accounts as the ſaid *C. A.* and *R. G.* are or ſhall be charged withal as ſheriff of the ſaid county of *M.* to our ſovereign Lord the King, his heirs or ſucceſſors, in any of his majeſty's courts, and of all ſums of money which ſhall be levied or received by the ſaid *J. R.* and *C. B.* or either of them, as under-ſheriff of the ſaid *C. A.* and *R. G.* or any bailiff or other perſon, by the direction or aſſent of the ſaid *J. R.* and *C. B.* or either of them, to the uſe of our ſovereign Lord the King, his heirs or ſucceſſors; That then, *&c.*

N°. III.

Appointment of the ſheriff of Middleſex's *clerks.*

THIS indenture made, *&c.* between *J. R.* of ——— *London*, gentleman, under-ſheriff to *C. A.* and *R. G.* eſqrs. ſheriff of the county of *M.* and *C. B.* of ——— *London*, gentleman, of the one part, and *S. B.* and *J. B.* of ———, *London*, gentleman, of the other part. *Whereas* the ſaid ſheriff hath admitted the ſaid *J. R.* into the office of his under-ſheriff, ſo that the guidance and management of the ſaid office, and all matters and things thereto relating or belonging, ſhall be and are to be and continue ſubject to and under the order, direction and power of them the ſaid *J. R.* and *C. B.* and by their order and direction, and not otherwiſe, to be performed and done during all the ſaid ſheriffwick, they the ſaid *J. R.* and *C. B.* having given ſecurity for his the ſaid *J. R.*'s faithful diſcharge of the ſaid office, and indemnifying the ſaid ſheriff: *Now this indenture witneſſeth*, that the ſaid *J. R.* and *C. B.* at the ſpecial inſtance and requeſt of the ſaid *S. B.* and *J. B.* have appointed and taken, and by theſe preſents do appoint and take the ſaid *S. B.* and *J. B.* to be clerks of the ſaid ſheriff, and of them the ſaid *J. R.* and *C. B.* in the ſaid office, to act, do and perform (together with *J. O.* of ———, gentleman, the other clerk of the ſaid ſheriff, and of them the ſaid *J. R.* and *C. B.*) all and every act and acts, thing and things neceſſary and convenient for executing the ſaid office of under-ſheriff of the ſaid county of *M.* and which ſuch clerks of the ſaid office have uſually and heretofore done and performed, during all the time and continuance of the ſaid ſheriff, with liberty for them the ſaid *S. B.* and *J. B.* (together with the ſaid *J. O.*) to take to their own uſe all lawful and uſual clerks fees: *In conſideration* whereof the ſaid

S. B.

S. B. and *J. B.* for themſelves, their heirs, executors and adminiſtrators, *do* covenant, promiſe and agree, to and with the ſaid *J. R.* and *C. B.* their executors and adminiſtrators, by theſe preſents, in manner following; (that is to ſay) That they the ſaid *S. B.* and *J. B.* ſhall and will, during all the ſhrievalty aforeſaid, well and honeſtly demean and behave themſelves in the ſaid office, and diligently and carefully ſerve and attend them the ſaid *J. R.* and *C. B.* in and about the diſpatch of the ſaid buſineſs in the ſaid office, and obſerve and perform all their lawful orders and directions thereto, and uſe and beſtow their utmoſt care, diligence and attendance therein: *And alſo* that they the ſaid *S. B.* and *J. B.* ſhall not, nor ſhall either of them make any warrant upon any writ of *Habere facias poſſeſſionem*, without receiving or agreeing for the fees due for the execution thereof, or without the direction or conſent of them the ſaid *J. R.* and *C. B.* or one of them. *And alſo* that they the ſaid *S. B.* and *J. B.* ſhall not, nor ſhall either of them, make any warrant whatſoever, to any other perſons than ſuch as are bailiffs of liberties, or ſheriffs bailiffs, who have given ſecurity to the ſatisfaction of them the ſaid *J. R.* and *C. B.* *and alſo* that they the ſaid *S. B.* and and *J. B.* ſhall not, nor ſhall either of them, make any warrant or warrants, on any writ or writs of execution againſt the body, goods or chattels of any perſon or perſons, for or on behalf of whom any writ or writs of privilege *De non moleſtando*, *ſuperſedeas* or *protection* ſhall be allowed in the ſaid office of the ſaid ſheriff; *and alſo* that they the ſaid *S. B.* and *J. B.* ſhall make all other lawful and ſufficient warrants upon any proceſs that ſhall come to their hands and be required of them; *and alſo* that they the ſaid *S. B.* and *J. B.* ſhall not, nor ſhall either of them accept or take any *Capias ad ſatisfaciendum* againſt any bailiff, to charge them in cuſtody of the ſaid ſheriff, or any meſne proceſs requiring bail for more than 20 *l.* without the direction of the ſaid *J. R.* and *C. B.* or one of them, but rather if the party applying will not ſtay for ſuch directions,

to give the party applying a warrant thereon; *and alſo* that they the ſaid *S. B.* and *J. B.* ſhall take good and ſufficient bonds and ſecurity of and from all perſons they or either of them ſhall let to bail, or to or for whom they ſhall make or grant any warrants of replevin, ſo that the ſheriff may be indemnified; *and alſo* that they the ſaid *S. B.* and *J. B.* ſhall not take any inquiſition upon any writ of *Ad quod damnum*, nor any extent, elegit, or ſpecial *Capias utlagatum*, where any houſes, lands or tenements are to be found; *and alſo* that they the ſaid *S. B.* and *J. B.* ſhall not return any writ of *Habeas corpus* for any perſon in cuſtody, or fined in any criminal matter, or on the King's proceſs, nor ſhall they diſcharge the body or goods of any ſuch perſon, againſt the directions of them the ſaid *J. R.* and *C. B. and alſo* that they the ſaid *S. B.* and *J. B.* ſhall not, nor ſhall either of them return any writs of *Venire facias*, *Diſtringas*, or precept, with any other panel than what the ſaid *J. R.* and *C. B.* or one of them, ſhall approve of, or impanel any grand jury, or jury of life and death, or any other inqueſt or jury whatſoever, without the conſent of the ſaid *J. R.* and *C. B. and alſo* that they the ſaid *S. B.* and *J. B.* ſhall not, nor ſhall either of them, return above 20*l.* iſſues on any writ of *Diſtringas* without a rule of court, or the ſaid *J. R.* or *C. B.* or one of their orders for ſo doing, or return *Devaſtavit* till after any inquiſition taken; *and alſo* that they the ſaid *S. B.* and *J. B.* ſhall make legal and ſufficient returns in due time, to the beſt of their power, of and upon all other writs and proceſs to be returned by them, and that they the ſaid *S. B.* and *J. B.* ſhall within ten days next after every term, during the ſaid ſhrievalty, or when and as often as they ſhall be by the ſaid *J. R.* and *C. B.* required, give unto the ſaid *J. R.* and *C. B.* or one of them, their or one of their executors or adminiſtrators, a juſt, true and perfect account of all ſuch monies and fees which they ſhall have received for the ſaid ſheriff and under-ſheriff, and pay the

the ſame to the ſaid *J. R.* and *C. B.* or one of them, their or one of their executors or adminiſtrators; and the ſaid *S. B.* and *J. B.* ſhall in their own proper perſons carefully and diligently attend all and every court and courts of juſtice, judges, juſtices or commiſſioners, when and as often as they ſhall be thereunto required by the ſaid *J. R.* and *C. B.* or either of them, and ſhall then and there perform all ſuch matters and things as ſhall be requiſite on the behalf of the ſaid ſheriff; *and* that the ſaid *S. B.* and *J. B.* ſhall during the time aforeſaid, and after ſuch time as the ſaid ſheriff ſhall go out of his office, at the requeſt of the ſaid *J. R.* and *C. B.* or either of them, aſſiſt the ſaid *J. R.* and *C. B.* and each of them, in the management of any affair relating to the ſaid office, as alſo in returning any writ or writs, or in the paſſing the accounts of the ſaid ſheriff, and doing all matters and things that ſhall be requiſite in order to the diſcharging and indemnifying the ſaid ſheriff, and procuring a *quietus*, and that without fee or reward for ſo doing; *and laſtly* the ſaid *S. B.* and *J. B.* for themſelves, their heirs, executors and adminiſtrators, do further covenant, promiſe and agree to and with the ſaid *J. R.* and *C. B.* their executors and adminiſtrators, in manner following; that is to ſay, that they the ſaid *S. B.* and *J. B.* ſhall and will from time to time, and at all times hereafter, at their or ſome of their own proper coſts and charges, well and ſufficiently ſave, defend, keep harmleſs and indemnified the ſaid *C. B.* and *R. G. J. R.* and *C. B.* and each and every of them, their and each and every of their goods and chattels, lands and tenements, and every of them, their and every of their executors and adminiſtrators, of and from all and all manner of action and actions, cauſe and cauſes of action, ſuits, troubles, fines, amerciaments, pains, penalties, ſum and ſums, contempts, forfeitures, judgments, executions, coſts, recoveries, loſſes, damages and expences whatſoever, and of and from all and every other trouble, charge and incumbrance

whatſoever, that ſhall or may at any time or times hereafter happen to ariſe, grow or be ſued forth, proſecuted, recovered, aſſeſſed, impoſed, ſet or taxed upon or againſt the ſaid *C. A. R. G. J. R.* and *C. B.* or any and either of them, or which they or any or either of them ſhall or may, at any time or times hereafter happen to ſuſtain, incur, or be put unto, for or by reaſon or means of any act, default, neglect, omiſſion, commiſſion or miſtake of them the ſaid *S. B.* and *J. B.* or either of them, in any matter, cauſe or thing whatſoever relating to the ſaid office. *Provided always*, that if the ſaid *S. B.* and *J. B.* or either of them, ſhall not obſerve, perform and keep the covenants and agreements herein above ſpecified, and behave themſelves to the good liking of them the ſaid *J. R.* and *C. B.* it ſhall and may be lawful for them the ſaid *J. R.* and *C. B.* to remove and put out the ſaid *S. B.* and *J. B.* or either of them from being a clerk or clerks in the ſaid office; and in caſe of ſuch removal they the ſaid *S. B.* and *J. B.* ſhall immediately deliver up all books, writings and papers relating to the ſaid office, neceſſary for the carrying on the Buſineſs of the ſame, to the ſaid *J. R.* and *C. B.* or one of them, and all other books, papers and writings which the ſaid *J. R.* and *C. B.* or either of them ſhall demand, being in the cuſtody or power of the ſaid *S. B.* and *J. B.* or either of them, or with which the ſaid *S. B.* and *J. B.* or either of them have been intruſted; the ſaid *J. R.* and *C. B.* giving the ſaid *S. B.* and *J. B.* a receipt or diſcharge for the ſame. *In Witneſs* whereof the ſaid parties firſt above named have to theſe preſent indentures interchangeably ſet their hands and ſeals the day and year firſt above written.

N°. 4.

Indenture of covenants from a bailiff and his ſureties to the high-ſheriff of Middleſex.

THIS indenture made the day of in the year of the reign of our ſovereign Lord *George* the Third, by the grace of God, of *Great Britain*, *France* and *Ireland* King, defender of the Faith, *&c.* and in the year of our Lord 1765, between *C. A.* Eſq; and *R. G.* Eſq; ſheriff of the county of *M.* of the one part, and *J. W.* of *B. M.* in the ſaid county of *M.* yeoman, [the bailiff] *J. B.* of *L. P. S.* in the pariſh of St. *A. H.* in the ſaid county, baker, *W. Q.* of *P. L.* in the ſaid pariſh and county, dealer in coals, *F. P.* of *H. H.* in the ſaid county, inn-holder, and *R. F.* of *L. L.* in the ſaid pariſh and county, peruke-maker, [*J. W's.* ſureties] of the other part, *Witneſſeth*, That whereas the ſaid *C. A.* and *R. G.* at the ſpecial inſtance and requeſt of the ſaid *J. W. J. B. W. Q. F. P.* and *R. F.* hath granted, nominated, and appointed, and by theſe preſents doth grant, nominate, and appoint the ſaid *J. W.* to be one of the bailiffs of them the ſaid *C. A.* and *R. G.* of the hundred of *O.* in the county of *M.* for and during all the time that the ſaid *C. A.* and *R. G.* or either of them, ſhall continue ſheriff of the ſaid county of *M.* and that the ſaid *J. W.* ſhall take to his own uſe all lawful fees and profits to him belonging, as one of the bailiffs of the ſaid hundred, reſerving always to the ſaid *C. A.* and *R. G.* all and all manner of fees which ſhall from time to time happen, grow due, or accrue by reaſon of the executing or ſerving of any manner of execution, *capias ad ſatisfaciendum*, *fieri facias*, or extent; and alſo all other fees, dues, profits, and emoluments to them the ſaid *C. A.* and *R. G.* or either of them, incident or belonging to them as ſheriff of the

the ſaid county of *M.* *And whereas* the ſaid *J. W.* hath not only undertaken the executing and diſcharging of the ſame place or office of one of the ſaid bailiffs of the ſaid hundred of *O.* but alſo hath taken his corporal (*) oath in due form of law for that purpoſe, the ſaid *J. W.* *J. B.* *W. Q.* *F. P.* and *R. F.* for and in conſideration of the premiſſes, for themſelves and every one of them ſeverally, their and every of their ſeveral heirs, executors and adminiſtrators, do by theſe preſents covenant, grant, and agree to and with the ſaid *C. A.* and *R. G.* and each of them, their and each of their heirs, executors and adminiſtrators, that he the ſaid *J. W.* from time to time, and at all times hereafter, for and during all the time that the ſaid *C. A.* and *R. G.* or either of them, ſhall continue ſheriff of the ſaid county of *M.* ſhall in and by all things in his ſaid place or office well, truly, lawfully, and honeſtly bear and behave himſelf, and faithfully and diligently ſerve and attend them the ſaid *C. A.* and *R. G.* and the ſurvivor of them as ſheriff; and *J. B.* gent. now under-ſheriff to the ſaid ſheriff of the ſaid county of *M.* and every of the deputies of them the ſaid ſheriff or under-ſheriff in the ſaid office; and in due and lawful manner all their and every of their lawful commands or directions touching any Manner of ſervice incident or belonging to the ſaid ſheriff of the ſaid county of *M.* or to any bailiff of the ſaid county of *M.* as well within the ſaid hundred of *O.* as in any other place or hundred within the ſaid county of *M.* willingly, readily, lawfully, and dutifully ſhall do, execute and perform; *and* alſo that the ſaid *J. W.* ſhall at all times hereafter, and from time to time, for and during all the time that the ſaid *C. A.* and *R. G.* or either of them, ſhall continue ſheriff of the ſaid county of *M.* duly, faithfully, and lawfully execute and ſerve all and all manner of briefs, warrants, precepts or mandates, directed or to be directed to the bailiff of the ſaid hundred of *O.*

(*) Modern Practice diſpenſes with this Oath.

or

or to him the ſaid *J. W.* by or in the name of the ſaid ſheriff, or by or in the name of any officer or perſon in that behalf lawfully authorized, which ſhall be tender'd or come to the hands of the ſaid *J. W.* to be executed or ſerved, and ſhall make true, direct, and lawful return and returns, and anſwer in writing, ſubſcribed with his own hand, of, to or upon every ſuch brief, warrant, precept or mandate; and ſhall deliver the ſame, together with the ſame returns, to the ſaid ſheriff or under-ſheriff for the time being, at the publick office of the ſaid ſheriff, on or before the days or times of the return or returns of the ſame brief, warrant, precept or mandate, without any manner of fraud or delay, whether the ſame ſhall be demanded or not. *And* alſo the ſaid *J. W.* from time to time, and at all times, during ſuch time as the ſaid *C. A.* and *R. G.* or the ſurvivor of them, ſhall continue ſheriff of the ſaid county of *M.* ſhall receive and take into his ſafe cuſtody alone, or jointly with other bailiff or bailiffs of the ſaid county, the body and bodies of ſuch priſoner and priſoners, which the ſaid ſheriff, under-ſheriff, or any of his or their deputy or deputies, ſhall by warrant upon any writ of *Habeas Corpus* tender and require the ſaid *J. W.* to receive and take into his ſafe cuſtody, and ſhall by virtue of ſuch warrant and writ of *Habeas Corpus* ſafely conduct and carry ſuch priſoner or priſoners to be delivered before ſuch court or courts, judge or judges, or to ſuch ſheriff or ſheriffs, gaoler or gaolers, as the ſaid writs of *Habeas corpus* and warrant, to him directed thereon, ſhall appoint; and ſhall ſafely conduct and deliver ſuch priſoner and priſoners before ſuch court or judge, or into the ſafe cuſtody of ſuch ſheriff or ſheriffs, gaoler or gaolers, as the ſaid writ or writs ſhall direct, and take the receipt of ſuch ſheriff or ſheriffs, gaoler or gaolers, indorſed upon ſuch writ or writs of *Habeas Corpus*, for ſaving harmleſs the ſaid *C. A.* and *R.* and him the ſaid *J. B.* [the under-ſheriff] in that behalf. *And* in caſe any ſuch priſoner and priſoners ſhall be remanded, that then he the ſaid *J. W.* ſhall

forthwith

forthwith safely convey and commit every such prisoner to the custody of the keeper of the gaol of *Newgate*. *And* also the said *J. W. J. B. W. Q. F. P.* and *R. F.* for themselves, and every of them jointly and severally, their and every of their several heirs, executors and administrators do covenant and grant to and with the said *C. A.* and *R. G.* and each of them, their and each of their heirs, executors and administrators, by these presents, that the said *J. W.* hath not heretofore suffered to go at large or to escape, nor shall hereafter at any time or times, for and during all the time that the said *C. A.* and *R. G.* or either of them shall continue sheriff of the said county of *M.* set at liberty, or suffer to go at large, or to escape, any person or persons whatsoever heretofore arrested or attached, or which shall hereafter be arrested or attached by the said *J. W.* alone or together with or by any other bailiff or officer, by his, their or any of their body or bodies, by virtue of any writ, warrant, precept or mandate whatsoever of the said sheriff; or which now are or hereafter shall be in, or committed to the charge or custody of him the said *J. W.* alone or together with or by any other bailiff or officer, as prisoner or prisoners of or to the said sheriff, for any cause or causes whatsoever, until the said *J. W.* shall have a lawful and sufficient warrant for the discharging of such prisoner or prisoners, under the hand writing of the said sheriff, under-sheriff, deputy or clerk in that behalf authorized. *And* also that the said *J. W.* shall not at any time hereafter deliver or suffer any goods or chattels to be purloined or taken out of his possession, which shall be seized or taken in execution (or otherwise howsoever) by the said *J. W.* alone or together with any other bailiff or officer of the said sheriff, or which shall be delivered or left in the hands or custody of him the said *J. W.* by the said sheriff or under-sheriff or any their deputies or clerks, until the said *J. W.* shall have a lawful and sufficient warrant for the delivery of the same under the hand-writing of the said sheriff, un-

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der-ſheriff or deputy, but ſhall make or cauſe to be made a juſt, true and perfect inventory of all ſuch goods by him ſo ſeized, or which ſhall come to his hands, within the ſpace of twenty-four hours after the ſame ſhall be ſeized or come to his hands as aforeſaid, and ſhall cauſe the ſame to be appraiſed by two appraiſors, one of them to be appointed by the ſaid ſheriff, and ſhall as ſoon as conveniently may be, after ſuch appraiſment made, deliver a true copy thereof ſigned by the ſaid *J. W.* to the ſaid under-ſheriff, his deputy or clerk, or ſome or one of them, and likewiſe ſhall and will, when and as often as any goods or chattels by him ſo ſeized or taken are ſold, (if the money for which ſuch goods ſhall be ſold ſhall come to the hands, cuſtody or poſſeſſion of the ſaid *J. W.*) forthwith pay or cauſe to be paid to the ſaid under-ſheriff, his deputy or clerk, or ſome or one of them, all ſuch ſum or ſums of money for which the ſame ſhall be ſold; *and* likewiſe all and every ſuch ſum and ſums of money, that ſhall at any time or times hereafter, during the ſheriffwick of the ſaid *C. A.* and *R. G.* be received by the ſaid *J. W.* of any perſon or perſons by him taken, or that ſhall be in his cuſtody in execution, by virtue of any warrant to him or any other bailiff directed, on a writ of *Capias ad ſatisfaciendum*. *And* the ſaid *J. W.* his executors or adminiſtrators from time to time, and at all times during ſuch time as the ſaid *C. A.* and *R. G.* or either of them ſhall continue ſheriff of the ſaid county of *M.* and alſo after ſuch time as the ſaid *C. A.* and *R. G.* ſhall go out and be diſcharged of the ſaid office of ſheriff of the ſaid county of *M.* ſhall truly and diligently levy, collect and gather all and every the ſum and ſums of money wherewith the ſaid *C. A.* and *R. G.* or the ſurvivor of them ſhall ſtand charged or chargeable in his majeſty's court of *Exchequer* at *Weſtminſter*, or any other court whatſoever, to be levied, collected and gathered within the ſaid hundred of *O.* by reaſon of their ſaid office of ſheriff of the ſaid county of *M.* And for levying whereof, the ſaid *J. W.*

his executors or adminiſtrators ſhall have a ſufficient warrant delivered or tendered to him, them or any of them. *And* that the ſaid *J. W.* his executors or adminiſtrators ſhall well and truly ſatisfy and pay all and every the ſame ſum and ſums of money to the ſaid *J. B.* [the under-ſheriff] or to the ſaid *C. A.* and *R. G.* their or either of their executors or adminiſtrators, at or before the return of ſuch warrant, which for levying of the ſame ſhall be delivered or tendered the ſaid *J. W.* his executors or adminiſtrators as aforeſaid; ſo as the ſaid ſheriff may make payment of the ſaid money into the ſaid court of *Exchequer* in due time, and may paſs and perfect his account at the time limited by the ſaid court; and that the ſaid *J. W.* ſhall upon requeſt ſubſcribe his name, teſtifying the receipt of every ſuch warrant. *And* alſo that the ſaid *J. W.* ſhall from time to time, and at all times during ſuch time that the ſaid *C. A.* and *R. G.* or either of them ſhall continue ſheriff of the ſaid county of *M.* ſeize and take into his hands and cuſtody all and all manner of goods and chattels of felons, fugitives and perſons outlawed, or waived, and goods and chattels waived or ſtray'd, which ſhall happen to be found, had or taken within the ſaid hundred of *O.* during the time that the ſaid *C. A.* and *R. G.* or either of them ſhall continue ſheriff of the ſaid county of *M.* And thereof, and of all other ſums of money, fees and profits in any wiſe due, belonging or incident to the ſaid ſheriff or under-ſheriff, which ſhall at any time happen or come to the hands or cuſtody of him the ſaid *J. W.* by reaſon of executing the ſaid place or office of one of the bailiffs, of the ſaid hundred of *O.* ſhall make a juſt and true account and payment or delivery to the ſheriff or under-ſheriff, when and as often as the ſaid *J. W.* ſhall be thereunto required. *And* alſo that the ſaid *J. W.* during all the time that the ſaid *C. A.* and *R. G.* or either of them ſhall continue ſheriff of the ſaid county of *M.* ſhall diligently and carefully in his own perſon, in due manner, attend at all and every general and quarter-ſeſſions of the peace

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at *Hicks's Hall*, and ſeſſions of *Oyer* and *Terminer* and gaol-delivery to be holden for the ſaid county of *M.* at *J. H.* in the *O. B. L.* or at any other place or places within the ſaid county of *M.* or *L.* or elſewhere, during the whole time that the ſaid *C. A.* and *R. G.* or either of them ſhall continue to be ſheriff of the ſaid county of *M.* and during the continuance of ſuch ſeſſion and ſeſſions; and ſhall there do, perform and accompliſh all ſuch things as to his ſaid office of bailiff ſhall appertain. And that the ſaid *J. W.* during all the time that the ſaid *C. A.* and *R. G.* or either of them ſhall continue ſheriff of the ſaid county, as often as he ſhall arreſt any perſon by virtue of any warrant whatever, before the perſon ſo arreſted ſhall be carried to any publick or other houſe, or before any liquor or meat ſhall be called for, he the ſaid *J. W.* ſhall ſhew and deliver to the perſon ſo arreſted a copy of the following clauſes, part of an act of Parliament paſſed in the thirty-ſecond year of the reign of his late Majeſty's King *George* the Second, [*chap.* 28. *ſect.* 1, 2.] intituled, *An act for the relief of debtors, with reſpect to the impriſonment of their perſons, and to oblige Debtors, who ſhall continue in execution in priſon beyond a certain time, and for ſums not exceeding what are mentioned in the act, to make diſcovery of, and deliver upon oath, their eſtates for their creditors benefit*: and alſo that the ſaid *J. W.* ſhall ſuffer the perſon ſo arreſted, or any friend of his, to read the ſame, which ſaid clauſes follows in theſe words: *Be it therefore enacted by the King's moſt excellent Majeſty, by and with the advice and conſent of the Lords Spiritual and Temporal, and Commons, in this preſent parliament aſſembled, and by the authority of the ſame, That no ſheriff, under-ſheriff, bailiff, ſerjeant at mace, or other officer or miniſter whatſoever, ſhall at any time or times hereafter convey or carry, or cauſe to be conveyed or carryed, any perſon or perſons by him or them arreſted, or being in his or their cuſtody, by virtue or colour of any action, writ, proceſs, or attachment, to any tavern, ale-houſe, or other publick victualling or drinking-houſe, or to the private houſe of*

any ſuch officer or miniſter, or of any tenant or relation of his, without the free and voluntary conſent of the perſon or perſons ſo arreſted or in cuſtody; nor charge any ſuch perſon or perſons with any ſum of money for any wine, beer, ale, victuals, tobacco, or any other liquor or things whatſoever, ſave what he, ſhe or they ſhall call for of his, her or their own free accord; nor ſhall cauſe or procure him, her or them to call or pay for any ſuch liquor or things, except what he, ſhe or they ſhall particularly and freely aſk for; nor ſhall demand, take or receive, or cauſe to be demanded, taken or received directly or indirectly, any other or greater ſum or ſums of money, than is or ſhall be by law allowed to be taken or demanded for any arreſt or taking, or for detaining or waiting till the perſon or perſons ſo arreſted or in cuſtody ſhall have given an appearance or bail, as the caſe ſhall require, or agreed with the perſon or perſons at whoſe ſuit or proſecution he, ſhe or they ſhall be taken or arreſted, or until he, ſhe or they ſhall be ſent to the proper gaol belonging to the county, riding, diviſion, city, town or place where ſuch arreſt or taking ſhall be; nor ſhall exact or take any reward, gratuity, or money for keeping the perſon or perſons ſo arreſted or in cuſtody out of gaol or priſon, nor ſhall carry any ſuch Perſon to any gaol or priſon within four and twenty hours from the time of each arreſt, unleſs ſuch perſon or perſons ſo arreſted ſhall refuſe to be carried to ſome ſafe and convenient dwelling-houſe of his, her or their own nomination or appointment, within a city, borough, corporation or market-town, in caſe ſuch perſon or perſons ſhall be there arreſted, or within three miles from the place where ſuch arreſt ſhall be made, if the ſame ſhall be made out of any city, borough, corporation or market-town, ſo as ſuch dwelling-houſe be not the houſe of the perſon arreſted, and be within the county, riding, diviſion or liberty in which the perſon under arreſt was arreſted; and then and in any ſuch caſe it ſhall be lawful to and for any ſuch ſheriff, or other officer or miniſter, to convey or carry the perſon or perſons ſo arreſted, and refuſing to be carried to ſuch ſafe and convenient dwelling-houſe as aforeſaid, to ſuch gaol or priſon as he, ſhe or they may be ſent to by virtue of

of the action, writ or proceſs againſt him, her or them; nor ſhall carry any ſuch perſon to any gaol or priſon within four and twenty hours from the time of ſuch arreſt; nor ſhall take or receive any other or greater ſum or ſums for one or more night's lodging, or for a day's dyet or other expences, of any perſon or perſons under arreſt on any writ, action, attachment or proceſs, other than what ſhall be allowed as reaſonable in ſuch caſes, by ſome order or orders already made, or which ſhall hereafter be made by the juſtices of the peace at ſome general or quarter-ſeſſions which ſhall be held for the county, riding, diviſion, city, town or place where ſuch arreſt or taking ſhall be, who are hereby authorized and required with all convenient expedition to make ſome ſtanding order or orders for aſcertaining ſuch charges and expences within their reſpective counties, ridings, diviſions, cities, towns and juriſdictions, if the ſame hath or have not already been there made; and if any ſuch order or orders hath or have been there already made, ſuch juſtices for the time being, at their reſpective general or quarter-ſeſſions, are hereby authorized and required to vary or alter the ſame from time to time as they ſhall ſee occaſion; and alſo are hereby required to cauſe a copy of every ſuch order, and of every variation or alteration thereof, ſigned by the clerk of the peace of every ſuch county, riding, diviſion, city, town or place reſpectively, to be put and kept up in ſome conſpicuous place in the ſeſſions-houſe, or ſome other proper place of every ſuch reſpective county, riding, diviſion, city, town or place, as ſuch juſtices ſhall order, ſo as the ſame may be there ſeen and examined as occaſion may require. And alſo that the ſaid *J. W.* at all times hereafter, and from time to time, during the time that the ſaid *C. A.* and *R. G.* or either of them ſhall continue ſheriff of the ſaid county of *M.* ſhall immediately, after any arreſt by him made, give notice of the ſame to the under-ſheriff aforeſaid, or to ſome or one of his clerks, and duly enter the names of the party by him ſo arreſted or attached in the office of the ſaid ſheriff; and ſhall ſafely deliver into the priſon, in the charge or cuſtody of the gaoler or

keeper of the gaol of *N.* all ſuch perſons who from time to time ſhall be arreſted or attached or by his their body or bodies by the ſaid *J. W.* within the ſpace of twenty-five hours next after ſuch arreſt, or attachment done, (except in the mean time they ſhall be lawfully diſcharged) there to be ſafely kept until they ſhall be from thence duly diſcharged. And if it ſhall ſo happen, that the ſaid *J. W.* ſhall keep or detain any perſon or perſons by him ſo arreſted or attached as aforeſaid, in his own houſe or elſewhere, and ſhall not deliver him or them into the gaol of *N.* within twenty-five hours next after ſuch arreſt or attachment done as aforeſaid, that then and in ſuch caſe he the ſaid *J. W.* his executors or adminiſtrators ſhall well and truly pay or cauſe to be paid to the ſaid ſheriff or the under-ſheriff the full ſum of ten pounds of lawful money of *Great Britain*, for every hour that he the ſaid *J. W.* ſhall keep or detain in his cuſtody out of the gaol of *N.* any perſon or perſons by him ſo arreſted or attached as aforeſaid, beyond and above the before limited time of twenty-five hours, (except the ſaid perſon or perſons by him ſo arreſted or attached, ſhall be in the mean time lawfully diſcharged as aforeſaid, and except the ſaid *J. W.* ſhall have licence in writing under the hand and ſeal of the ſaid ſheriff or under-ſheriff, for the keeping and detaining in his cuſtody of the perſon or perſons ſo by him arreſted or attached, for a longer time.) *And* that the ſaid *J. W.* neither by himſelf, or with any other bailiff or other perſon, ſhall do, commit or ſuffer any act or thing, which ſhall be or tend to the hurt, loſs, damage or hindrance of the ſaid ſheriff or under-ſheriff or any of them. *And* alſo the ſaid *J. W. J. B. W. Q. F. P.* and *R. F.* for themſelves, and every one of them jointly and ſeverally, and for their ſeveral heirs, executors and adminiſtrators do covenant, promiſe and grant to and with the ſaid *C. A.* and *R. G.* and each of them, their and each of their heirs, executors and adminiſtrators, by theſe preſents, that the ſaid *J. W.* ſhall not at any time hereafter ſeize or take in

in execution the goods of, or attach or arreſt the body of any ambaſſador or foreign miniſter, or the ſervant of any ambaſſador or foreign miniſter, or of any other perſon whatſoever privileged or protected, without licence in that behalf firſt had and obtained under the hand-writing of ſuch perſon or perſons, who for the time being have good authority to grant licence in that behalf: nor ſhall at any time hereafter, by virtue of any warrant whatſoever, upon mean proceſs, arreſt or attach any perſon whatſoever, againſt whom the ſaid *J. W.* ſhall know any outlawry after judgment, *Capias ad ſatisfaciendum*, or other execution whatſoever, to be either in the hands or cuſtody of the ſaid *J. W.* or of any other perſon whatſoever; but before any ſuch arreſt ſhall make the ſaid *J. B.* or ſome of his clerks, acquainted with the ſame outlawry or execution, and ſhall cauſe the party ſo arreſted, to be charged with the ſame execution or outlawry, before he ſhall be diſcharged of the ſame arreſt, upon mean proceſs as aforeſaid. And alſo, that if the ſaid *J. W.* ſhall at any time hereafter let to bail any perſon or perſons by him arreſted or attached, by virtue of any warrant, precept or mandate of the ſaid ſheriff, upon any writ, bill or warrant, being bailable by law, that the ſaid *J. W.* ſhall take of every ſuch perſon, ſo by him arreſted or attached, a ſufficient bond of appearance, in the name of the ſaid ſheriff, duly executed and witneſſed, in ſuch penal ſum or ſums of money, as the writ, bill or warrant on which the ſaid perſon or perſons ſo arreſted or attached ſhall require, upon reaſonable ſureties of ſufficient perſons, having ſufficient within the ſaid county of *M.* to keep their days in ſuch place or places, as the ſaid writ or writs, bills or warrants ſhall require, according to the form of the ſtatute in that caſe made and provided: and that the ſaid *J. W.* before ſuch time as he ſhall let to bail any perſon ſo arreſted or attached, ſhall procure a certificate in writing under the hand of the ſaid *J. B.* his deputy or clerk, purporting that there are no other writs or proceſs than in the ſheriff's office againſt the ſaid perſon

ſon ſo arreſted or attached, and all and every bond and bonds ſo as aforeſaid taken, or to be taken by him the ſaid *J. W.* of any perſon or perſons whatſoever, he the ſaid *J. W.* ſhall on or before the day of the return of the writ or proceſs, on which ſuch bond ſhall be taken, deliver the ſame to him the ſaid ſheriff, or the ſaid under-ſheriff, deputy or clerks, fair and uncancelled, at the publick office of the ſaid ſheriff, whether the ſame ſhall be demanded or not; to the end the ſaid ſheriff may make due return of ſuch writs and proceſs accordingly. *And further*, that the ſaid *J. W.* ſhall from time to time and at all times hereafter during the time that the ſaid *C. A.* and *R. G.* or either of them ſhall continue ſheriff of the ſaid county of *M.* appear to all writs, proceſs and precepts, which ſhall be delivered to the ſaid ſheriff againſt him, and ſhall put in ſuch bail to all ſuch writs, proceſs and precepts, as the ſame ſhall require, or elſe render his body to the ſame; and further ſhall do and perform all ſuch things as the law in that behalf ſhall require: and alſo ſhall ſatisfy and pay unto the ſaid ſheriff, his executors or adminiſtrators, or to the ſaid *J. B.* all ſuch ſum and ſums of money for which any writ of execution ſhall be delivered to the ſaid ſheriff againſt him the ſaid *J. W.* or otherwiſe ſhall render himſelf a priſoner to the aforeſaid ſheriff thereupon: and alſo in caſe any debt, damage, ſum or ſums of money whatſoever ſhall at any time or times hereafter be recovered, adjudged or decreed againſt the ſaid *C. A.* and *R. G.* or either of them as ſheriff of the ſaid county of *M.* for the eſcape or ſuffering to go at large of any priſoner or priſoners whatſoever, or for taking inſufficient bail of priſoners bailable by law, or refuſing or neglecting to take ſufficient bail, or for taking bail of ſuch priſoners as by law are not bailable, or by miſtake in levying one perſon's goods for another, or for any other cauſe, where it ſhall appear that the ſaid eſcape or ſuffering to go at large, taking ſuch goods, or other cauſe, were occaſioned, made, done, committed or ſuffered by the default, negligence,

gence, permiſſion or occaſion of the ſaid *J. W.* or any of his ſervants, or others by him entruſted or employed; that in every ſuch caſe the ſaid *J. W. J. B. W. Q. F. P.* and *R. F.* or ſome of them ſhall well and truly ſatisfy and pay unto every ſuch perſon or perſons as ſhall ſo recover againſt the ſaid *C. A.* and *R. G.* or either of them, or unto whom any thing ſhall be adjudged or decreed, all and every the ſame debts, damages, ſum and ſums of money, goods or things ſo recovered, adjudged or decreed, without any further ſuit or delay, and ſhall thereof clearly exonerate, acquit and diſcharge the ſaid *C. A.* and *R. G.* and each of them, their and each of their heirs, executors and adminiſtrators, and ſhall likewiſe ſatisfy and pay to the ſaid ſheriff, or the ſaid under-ſheriff, all ſuch ſum and ſums of money as the ſaid ſheriff or under-ſheriff or any of them ſhall have diſburſed or expended in defending any ſuch ſuit, over and above the uſual coſts in any court or courts againſt the ſaid ſheriff in that behalf adjudged. *Provided nevertheleſs*, and it is covenanted, concluded, condeſcended and agreed upon, by and between the ſaid Parties to theſe preſents, that when and ſo ſoon as the ſaid *J. W.* ſhall make breach of any of the covenants, articles, and agreements, which by and on the behalf of him the ſaid *J. W.* are or ought to be obſerved, performed, fulfilled and kept, that then and from thenceforth it ſhall and may be lawful for the ſaid ſheriff or the ſaid under-ſheriff, deputies or clerks, to remove and put out the ſaid *J. W.* from being a bailiff of the ſaid hundred: and in caſe of ſuch removal, that he the ſaid *J. W.* ſhall deliver or cauſe to be delivered unto the ſaid ſheriff, deputy or clerks, all ſuch warrant or warrants, precept or precepts, bond and bonds, writing and writings whatſoever, which may or ſhall in any wiſe appertain or belong to the ſaid office: and alſo ſhall pay to the ſaid ſheriff or under-ſheriff all and every ſum and ſums of money by him the ſaid *J. W.* levied, received, or collected by virtue of any ſuch warrant, precepts or mandate of the ſaid ſheriff, and then remaining

in his hands; the ſaid ſheriff or under-ſheriff giving unto the ſaid *J. W.* a receipt or acquittance for the ſame. *In witneſs* whereof, the parties to theſe preſent indentures have interchangeably ſet their hands and ſeals, the day and year firſt above written.

Sealed and delivered
in the preſence of

J. O.
T. G.

J. W.
J. B.
W. Q.
F. P.
R. F.

N. B. The ſheriff uſually takes a bond for performance of covenants.

N°. V.

Bond to the ſheriffs of London, *on a perſon being made ſerjeant at mace.*

The obligation to be from R. Y. *to* C. A. *and* R. G. *Penalty* 5000 *l.*

WHEREAS the (*) within bounden *R. Y.* is retained by the within named ſheriffs of *London*, in the office of a ſerjeant of mace, from the day of the date within written, incluſive, until the feaſt of St. *Michael* the Archangel, which ſhall be in the year of our Lord 1766 excluſive: *Now the condition* of the obligation within written is ſuch, that if the ſaid *R. Y.* and his yeoman ſhall not per-

(*) It was the antient cuſtom to write the obligation on one ſide, and the condition by indorſement on the other ſide, which cuſtom in ſome caſes is now obſerved; and the word *within* is here and in other places uſed inſtead of *above*.

mit

mit any perſon or perſons by him or them taken in execution by the time aforeſaid, by virtue of any warrant to any of the ſerjeants at mace of the ſaid ſheriffs, by the ſaid ſheriffs directed, to go at liberty out of their cuſtody, but the ſaid perſons and every of them ſhall ſafely and ſecurely keep, until the plaintiff named in ſuch execution ſhall ſeal and deliver a good and ſufficient releaſe of ſuch execution to the uſe of the ſaid ſheriffs, or that the ſame perſon or perſons ſhall otherwiſe be diſcharged by due courſe of law, as the ſecondary ſhall direct, or ſhall commit the ſaid perſon or perſons to priſon within the ſaid city of *London*, under the cuſtody of the ſaid ſheriffs; *and* ſhall in no wiſe deliver or pay any ſum or ſums of money by him the ſaid *R. Y.* levied or ſeized, either to the plaintiff named in ſuch execution, or to any other perſon or perſons whatſoever, until ſuch plaintiff ſhall ſeal and deliver a good and ſufficient releaſe of ſuch execution to the uſe of the ſaid ſheriffs, or ſome other diſcharge as the ſecondary ſhall direct or approve of; *and* ſhall, upon all ſuch ſeizure and ſeizures by him to be made of any goods by virtue of any execution, take care that able and ſubſtantial men be made uſe of for appraiſers, and ſuch as are ſkilful in the commodities ſeized, and that of ſuch goods ſo ſeized he ſhall forthwith bring an inventory into the office; *and alſo* that the ſaid *R. Y.* after an arreſt made by him by virtue of any warrant upon any mean proceſs, ſhall, at or before the return thereof, bring the perſon or perſons arreſted by him to the ſaid office at the *Compter*, to bail, whence ſuch warrant is granted, or for want thereof, commit him to the proper priſon appointed for that purpoſe, or cauſe ſuch writ, in caſe of an agreement betwixt the parties plaintiff and defendant in ſuch writ named, to be withdrawn, or otherwiſe ſufficiently diſcharged, by allowance of the ſecondary; *and alſo* in caſe any writ or writs ſhall be brought to the ſaid office, either to the ſaid ſecondary or his clerk, againſt the ſaid *R. Y.* at the ſuit of any perſon or perſons whatſoever

ſoever, that the ſaid *R. Y.* upon notice thereof, ſhall either give appearance or bail to ſuch writs as the nature of them ſhall require; *and likewiſe* that if the ſaid *R. Y.* and his yeoman ſhall well and faithfully ſerve the ſaid ſheriffs, and either of them, in their reſpective places during the time aforeſaid, and ſhall ſave harmleſs and indemnified the ſaid ſheriffs, and each of them, their and each of their heirs, executors, and adminiſtrators, as well againſt our ſovereign Lord the King, his heirs and ſucceſſors, as againſt any other perſon or perſons whatſoever, for or by reaſon of any execution or executions, eſcapes, or any other matter or thing whatſoever, which during the time aforeſaid ſhall be done and executed by the ſaid *R. Y.* or any his deputies or aſſigns, by reaſon or colour of his ſaid office, which he or they by virtue of his ſaid office ought to have done; and ſhall alſo during the ſaid time well and ſufficiently obſerve and fulfil all and every the commands of the ſaid ſheriffs, their under ſheriffs or ſecondaries, and thoſe deputed by the ſaid ſheriffs to execute their office of ſheriffwick; Then the within written obligation to be void, otherwiſe to be and remain in full force and virtue.

N°. VI.

Form of a bond in replevin.

Bond and condition in replevin, by ſtat. 11 *Geo.* 2. *c.* 19.

KNOW all men by theſe preſents; That we *George Adams* of *Reading*, in the county of *Berks*, gent. and *John Brown* of the ſame town and county, yeoman, are held and firmly bound to *George Mayday*, eſq; ſheriff of the county aforeſaid, in the ſum of 100*l.* of lawful money of *Great Britain*, to be paid by the ſaid *George Adams*, or his certain attorney, executors, adminiſtrators or aſſigns; for which payment to be well and truly made we bind ourſelves, and each of us binds himſelf,

ſelf, for the whole and in groſs, our heirs, executors and adminiſtrators, firmly by theſe preſents. Sealed with our ſeals the 14th day of *January* 1765, and in the fifth year of the reign of our Lord *George* the third, by the grace of God, of *Great Britain*, *France* and *Ireland* King, defender of the faith, *&c.*

The condition of this obligation is ſuch, that if the above bounden *George Adams* do appear at my next county court, to be holden for the county of *Berks*, at the town of *Reading*, on *Monday* the ſecond day of *July* next, and do proſecute there with effect his ſuit which he hath commenced againſt *Henry Howe*, for the taking and unjuſtly detaining of two oxen, *&c.* the goods of him the ſaid *George Adams*, and to make return of the ſaid goods, if return of the ſame ſhall be adjudged; That then this preſent obligation ſhall be void and of none effect. Condition.

N°. VII.

Aſſignment of replevin bond.

KNOW all men by theſe preſents; That *J. O. B.* eſq; ſheriff of the county of *E.* have, at the requeſt of the above named *R. L.* eſq; the avowant in this cauſe, aſſigned over unto him the ſaid *R. L.* this replevin bond, purſuant to the act of parliament in that caſe made and provided. *In witneſs* whereof I have hereunto ſet my hand and ſeal of office, this Day of 17

Sealed, *&c.*

N° VIII.

N°. VIII.

Appointment of the keeper of Newgate.

THIS indenture made, *&c.* between *C. A.* eſq; alderman of the city of *London*, and *R. G.* eſq; alſo alderman of the city of *London*, of the one part, and *R. A.* of ——— *London*, gentleman, of the other part; *Witneſſeth*, that the ſaid *C. A.* and *R. G.* being elected and choſen, and having taken upon them the office of ſheriffs of the city of *London*, and alſo the office of ſheriff of the county of *M.* for one whole year, commencing from the day of the date hereof, as well in conſideration of the aſſured hope and truſt that they the ſaid *C. A.* and *R. G.* have of the fidelity and honeſt dealing of the ſaid *R. A.* and of the confidence they repoſe in him, and for and in conſideration of the covenants and agreements herein after contained on the part and behalf of the ſaid *R. A.* his heirs, executors and adminiſtrators, to be kept and performed, as alſo for divers other good cauſes and conſiderations them the ſaid *C. A.* and *R. G.* thereunto moving, *have* and each of them *hath* (as much as in them lies and they lawfully may) deputed, ordained, conſtituted, authorized and appointed, and by theſe preſents *do*, and each of them *doth* depute, ordain, conſtitute, authorize and appoint the ſaid *R. A.* to be the gaoler or keeper, for and under them the ſaid *C. A.* and *R. G.* of all and every ſuch priſoner and priſoners as now is or are in the cuſtody or keeping of them the ſaid *C. A.* and *R. G.* or any of their deputy or deputies, ſervants or aſſigns, in the gaol or priſon of *Newgate*, or who ſhall at any time or times hereafter, during the ſheriffwick of the ſaid *C. A.* and *R. G.* be ſent, brought or committed priſoners to the ſaid gaol or priſon of *Newgate*, or delivered or committed into the cuſtody or keeping of them the ſaid *C. A.* and *R. G.* or either of them, as ſheriffs of *London*, or ſheriff of *M.* by virtue or means

means of any writ or writs, proceſs or proceſſes, warrant or warrants, mandate or mandates, or otherwiſe howſoever, on any pretence whatſoever, by any perſon or perſons having lawful authority in that behalf; but ſubject nevertheleſs to the proviſo or power of diſplacing or removing the ſaid *R. A.* from the ſaid office of gaoler or keeper of *Newgate*, at the will and pleaſure of the ſaid *C. A.* and *R. G.* or either of them; and they the ſaid *C. A.* and *R. G. have* and each of them *hath* conſtituted and appointed, and by theſe preſents *do* and each of them *doth* conſtitute and appoint the ſaid *R. A.* for them and in their names, or in the name of him the ſaid *R. A.* and to and for the proper uſe of him the ſaid *R. A.* to demand, take and receive all ſuch juſt and lawful profits, benefits, commodities, advantages, fees and perquiſites as ſhall and may be lawfully had, made, got, received or become due, or as are or ſhall be, during the ſheriffwick of the ſaid *C. A.* and *R. G.* incident, belonging or appertaining to the place or office of gaoler or keeper of *Newgate*, or ariſing therefrom, or by reaſon thereof, in any wiſe howſoever, as a recompence to the ſaid *R. A.* for his trouble, riſque and care in the executing of the ſaid office of gaoler or keeper of *Newgate*, and undertaking at his own proper coſts and charges, from time to time, during the ſheriffwick of the ſaid *C. A.* and *R. G.* or either of them; and his the ſaid *R. A.*'s being continued gaoler or keeper of the ſaid gaol of *Newgate* by the ſaid *C. A.* and *R. G.* or either of them, to find, provide and be at the expence of all neceſſary goods, utenſils and furniture for the uſe of the ſaid gaol or priſon of *Newgate*, and alſo of all requiſite and neceſſary irons, fetters, locks, bolts, manacles, hand-cuffs and other cuffs, ropes and other things uſually found and provided by any gaoler or keeper in or about the ſaid priſon, for the ſafe cuſtody of the priſoners committed, or to be committed during the ſaid ſheriffwick of the ſaid *C. A.* and *R. G.* thereto, according to his the ſaid *R. A.*'s covenant herein after for

that

that purpoſe mentioned; *and alſo* in conſideration that the ſaid *C. A.* and *R. G.* their heirs, executors and adminiſtrators ſhall be freed and diſcharged by the ſaid *R. A.* his heirs, executors and adminiſtrators, from time to time during his continuance in the ſaid office of gaoler, or keeper of *Newgate*, under them the ſaid *C. A.* and *R. G.* or either of them, from all charges and damages whatſoever relating to the ſaid office of gaoler, as herein after is mentioned, they the ſaid *C. A.* and *R. G. do* ſeverally covenant, promiſe and grant by theſe preſents, for themſelves and each of them, their and each of their executors and adminiſtrators, and with the ſaid *R. A.* his executors and adminiſtrators, that they the ſaid *C. A.* and *R. G.* ſhall and will allow unto the ſaid *R. A.* to and for his own uſe, all the juſt and lawful profits, benefits, commodities, advantages, fees and perquiſites, as ſhall be received by the ſaid *R. A.* by virtue of his office, during ſo long time as he ſhall be continued therein under them the ſaid *C. A.* and *R. G.* or either of them; *and* in conſideration of the premiſſes, and for other good cauſes and conſiderations, him the ſaid *R. A.* thereunto moving, he the ſaid *R. A.* for himſelf, his heirs, executors and adminiſtrators, and for every of them, doth covenant, promiſe and grant to and with the ſaid *C. A.* and *R. G.* their executors and adminiſtrators, by theſe preſents, that he the ſaid *R. A.* ſhall well and truly, duly, honeſtly and ſufficiently, during ſo long time as the ſaid *C. A.* and *R. G.* or either of them ſhall continue officers or ſheriffs of *London*, and ſheriff of *M.* and ſhall think fit to continue the ſaid *R. A.* in the ſaid office of gaoler or keeper of *Newgate*, execute and perform the ſame, and carefully, well, truly and honeſtly demean and behave himſelf therein, and in all matters and things whatſoever relating thereto, without committing any extortion, or accepting of any unlawful bribes, fees or rewards, either by himſelf or his agent or agents, deputy or deputies, ſervant or ſervants, or any others in truſt for

for him or to his uſe; *and alſo* that he the ſaid *R. A.* or his deputy or deputies, agent or agents, ſhall and will from time to time, and at all times from henceforth, during his the ſaid *R. A.*'s being continued in the ſaid office of gaoler by the ſaid *C. A.* and *R. G.* ſtand and be charged with all and every the priſoner and priſoners as is and are now remaining in or belonging to the ſaid gaol of *Newgate*; *and* likewiſe that the ſaid *R. A.* or his agents ſhall alſo from time to time, and at all times from henceforth, during the ſaid *R. A.*'s being continued in the ſaid office by the ſaid *C. A.* and *R. G.* receive and take into his cuſtody, and for ſafe keeping in the ſaid gaol, all and every the priſoner and priſoners who ſhall be from time to time hereafter (during ſo long time as they the ſaid *C. A.* and *R. G.* ſhall continue ſheriffs of and for the ſaid city of *London*, and ſheriff of the county of *M.* and continue the ſaid *R. A.* in the ſaid office) brought, committed or ſent to the ſaid gaol, or the cuſtody of the ſaid *C. A.* and *R. G.* or either of them, by virtue of any writ or writs, proceſs or proceſſes, mandate or mandates, warrant or warrants, by any perſon or perſons whomſoever, having lawful authority or power for that purpoſe; and the ſaid priſoner or priſoners as ſhall be ſo brought, committed or ſent as aforeſaid, and all and every the priſoner and priſoners now being and remaining in the ſaid gaol of *Newgate*, ſhall and will, well and truly, by himſelf, his deputy or deputies, keep ſafe and impriſoned according to the tenor, purport and effect of the warrants, precepts or commandments, writs or authority, by virtue of which he, ſhe or they, or any of them ſhall be or ſtand committed, charged or impriſoned, until ſuch priſoner or priſoners ſhall be delivered by due courſe of law, or ſet free and at liberty with the allowance of the ſaid *C. A.* and *R. G.* or their under-ſheriff, or delivered over to the next ſucceeding ſheriffs or ſheriff, upon the expiration of the ſhriffwick of the ſaid *C. A.* and *R. G. and alſo* that he the ſaid *R. A.* his deputy

deputy or deputies, agent or agents, ſervant or ſervants ſhall not nor will permit or ſuffer any priſoner or priſoners whomſoever to be delivered out of the ſaid gaol or priſon, unleſs by due courſe of law, without a *liberate* or ſome other ſufficient warrant from the ſaid *C. A.* and *R. G.* or their under-ſheriff, deputy or deputies, under the ſeal of the office firſt had and obtained; *and further* that he the ſaid *R. A.* his heirs, executors and adminiſtrators ſhall and will at all times hereafter acquit and diſcharge, or otherwiſe well and ſufficiently ſave, keep harmleſs and indemnified the ſaid *C. A.* and *R. G.* and each of them, their and each of their heirs, executors and adminiſtrators, their and each of their goods, chattels, lands, tenements and eſtate, of, from and againſt all and all manner of action and actions, cauſe and cauſes of action, ſuits, payments, damages, expences, fines, amerciaments, pains, ſum and ſums of money, penalties, contempts, forfeitures, judgments, executions, damages, coſts and loſſes, and of and from all and every other troubles, charges and incumbrances whatſoever, that ſhall or may happen, ariſe, grow or be put unto, or aſſeſſed, impoſed, laid, rated, ſet or taxed upon or againſt them the ſaid *C. A.* and *R. G.* or either of them, their or either of their heirs, executors or adminiſtrators, or their or either of their goods, chattles, lands or tenements, for or by reaſon of any eſcape or eſcapes, or letting any priſoner or priſoners, voluntarily or negligently, or otherwiſe, to get at large or eſcape, or for or by reaſon of any act, default, negligence, miſbehaviour, misfeazance or misfeazances, abuſes, miſdemeanors, commiſſion or commiſſions, omiſſion or omiſſions, default, delay or contempt, or for and by reaſon of any matter, cauſe or thing that ſhould or ought at any time, in any kind whatſoever, to be done or performed by the ſaid *R. A.* as gaoler or keeper of the ſaid priſon of *Newgate*, or by any of his deputy or deputies, clerk or clerks, agent or agents, officers or miniſters, ſervant or ſervants, or for or by reaſon

reaſon of his or their not doing, inſufficient doing, overdoing or neglecting his or their duty or duties, or returning, miſreturning, or the not due returning or executing any writ or writs, warrant or warrants, precept or precepts, mandate or mandates, or for or in reſpect of any matter, cauſe or thing whatſoever hereafter to be done or omitted to be done by him, them or either of them, concerning the ſaid office of gaoler or keeper of *Newgate*, or for or in reſpect of any demands or duties due or payable by the gaoler of the ſaid gaol to the judges or the clerks of aſſize, or clerks of the peace, judges ſervants, or other officers or perſons whatſoever, or for or by reaſon of the non-attendance of the ſaid *R. A.* as gaoler or keeper of the ſaid gaol, in any of the courts of judicature, or before any of the judges, juſtices of the peace, and officers having a legal authority to require his attendance, or for or by reaſon of the non-obſervance or non-obeyance of the commands of the ſeveral courts of our Lord the King, his heirs and ſucceſſors, before the ſaid *C. A.* and *R. G.* as ſheriffs of *London*, or ſheriff of *M.* held or to be held, or the not duly executing the ſaid office of keeper of the ſaid gaol of *Newgate*, or any ways relating thereunto, or for or by reaſon of any matter or thing whatſoever, in any wiſe concerning the ſaid office of gaoler of *Newgate*, or the execution thereof, and that without any troubles, coſts, charges, damages or expences therefore to be ſuſtained, incurred, or expended by the ſaid *C. A.* and *R. G.* or either of them, their or either of their heirs, executors or adminiſtrators in, about, for, touching or concerning the ſame; *And further*, that he the ſaid *R. A.* ſhall and will from time to time, and at all times from henceforth, during all the time that he ſhall continue in the ſaid office of gaoler, under the ſaid *C. A.* and *R. G.* make and keep a juſt, exact, true and perfect account or calendar in writing, containing as well all and every the name and names of all and every the priſoner and priſoners who now is and are, and

from

from time to time from henceforth hereafter, during the ſheriffwick of ſaid *C. A.* and *R. G.* and his the ſaid *R. A.*'s continuance in the ſaid office under them, ſhall be committed priſoner or priſoners to the ſaid gaol of *Newgate*; as alſo all and every the ſeveral cauſe and cauſes of commitment and impriſonment of all and every ſuch perſon and perſons, and the time when committed, and by whom, and likewiſe that he the ſaid *R. A.* his agent or agents ſhall and will from time to time, and at all times, during the ſheriffwick of the ſaid *C. A.* and *R. G.* deliver unto them the ſaid *C. A.* and *R. G.* and to all and every ſuch perſon and perſons as they the ſaid *C. A.* and *R. G.* or either of them ſhall from time to time direct, and when and as often, from time to time as thereunto required, true and fair copies in writing of ſuch calendar and calendars; *and alſo* that he the ſaid *R. A.* ſhall and will from time to time, and at all times from henceforth, during his continuance in the ſaid office, be truly diligent, attending, aſſiſting and aiding unto the ſaid *C. A.* and *R. G.* and their ſecondaries, under-ſheriff or underſheriffs, in all affairs and buſineſs whatſoever, wherewith the ſaid *C. A.* and *R. G.* is, are or ſhall be charged or employed in or about the keeping the ſaid gaol or priſon of *Newgate*; *and alſo* that he the ſaid *R. A.* ſhall and will alſo freely remove, carry and convey all manner of priſoner and priſoners, as well at the time of the ſeſſions of *Oyer* and *Terminer*, and gaol delivery for the ſaid city of *London* and county of *M.* as alſo at all other times, and to ſuch place and places, and to and before ſuch court and courts, perſon and perſons, and at and by ſuch time and times, as the ſaid *C. A.* and *R. G.* or their under-ſheriff or under-ſheriffs ſhall be charged or required by any legal proceſs or authority to convey, carry and remove ſuch priſoner or priſoners, and lay out and expend all monies whatſoever as ſhall be occaſioned thereby; and the ſame priſoner and priſoners ſhall from time to time, during the term aforeſaid, ſafely

remove

remove and carry back again to the ſaid gaol of *Newgate*, unleſs he, ſhe or they ſhall be removed or delivered out of the cuſtody of the ſaid *C. A.* and *R. G.* by due courſe of law (all ſuch allowance and allowances as ſhall be made, given allowed or paid by and from the exchequer or elſewhere, or that hath or have been uſually paid or allowed by the ſecondaries of *Wood-ſtreet* and the *Poultry* compter, *London*, or the under-ſheriff of *M.* or any or either of them, for the removing, carrying or recarrying ſuch priſoner or priſoners, being permitted to be had and taken by the ſaid *R. A.* to and for his own uſe); *and likewiſe* that he the ſaid *R. A.* ſhall and will, at his own proper coſts and charges, find and provide during the time he ſhall ſo continue in his ſaid office under the ſaid *C. A.* and *R. G.* as well all ſuch bedding, furniture and other things for the uſe of the ſaid gaol of *Newgate*, as ſhall be requiſite and neceſſary for the ſaid *C. A.* and *R. G.* to find and provide, or as they are by law, cuſtom or uſage obliged to find and provide for the ſame; as alſo all and every ſuch irons, links, locks, keys, bolts, manacles, hand-cuffs, and other cuffs, and all kind of fetters and other utenſils and things as ſhall be neceſſary to be uſed, or as there ſhall be occaſion for to be made uſe of in and about the ſaid gaol, for the better ſecurity and confinement of the priſoner and priſoners who now are or ſhall be, during the ſheriffwick of the ſaid *C. A.* and *R. G.* and his the *R. A.*'s being continued keeper of the ſaid gaol of *Newgate* by the ſaid *C. A.* and *R. G.* committed priſoners to the ſaid gaol, to prevent their making any eſcapes. *Provided always*, and it is hereby declared and agreed, by and between all the ſaid parties hereto, that it is the true intent, meaning and agreement of them and of theſe preſents, that it ſhall and may be lawful to and for the ſaid *C. A.* and *R. G.* or either of them, at any time or times during their or either of their continuance in the ſaid offices or office, of their or either of their free will and pleaſure, and without giving or ſhewing, or being compellable to give or

ſhew to him the ſaid *R. A.* or to any other perſon or perſons whatſoever, or to any court or courts of law or other judicature whatſoever, any cauſe or reaſon for their or either of their ſo doing, abſolutely to diſplace and remove the ſaid *R. A.* out of and from the ſaid place or office of keeper or gaoler of the ſaid gaol of *Newgate* aforeſaid, for and during all the reſidue of the ſaid time and term as ſhall be then to come of their ſheriffwick, any thing in theſe preſent indentures contained, or any other matter whatſoever to the contrary thereof in any wiſe notwithſtanding: *and* the ſaid *R. A.* for himſelf, his heirs, executors and adminiſtrators, and every of them *doth* further covenant, promiſe and agree to and with the ſaid *C. A.* and *R. G.* their executors and adminiſtrators, by theſe preſents, that in caſe of ſuch diſplacing or removing of him the ſaid *R. A.* as aforeſaid, he the ſaid *R. A.* after his being ſo diſplaced or removed, ſhall not nor will act as gaoler of the ſaid gaol of *Newgate* in any wiſe howſoever, during the ſheriffwick of the ſaid *C. A.* and *R. G.* and alſo that he the ſaid *R. A.* his executors or adminiſtrators, in caſe of ſuch removal of him the ſaid *R. A.* out of and from the ſaid office, ſhall and will within the ſpace of three days then next enſuing deliver over or cauſe to be delivered over unto the ſaid *C. A.* and *R. G.* or one of them, their or one of their executors, adminiſtrators or aſſigns, or ſuch perſon or perſons as they or either of them ſhall depute the poſſeſſion of the ſaid gaol, and all the priſoners therein, and all and all manner of books, papers and other things whatſoever relating or that have related to the ſaid office (ſince the ſaid *R. A.* ſhall have acted therein by virtue of theſe preſents) whole, ſafe and in good order, and without any alterations, razures or obliterations to be made therein after ſuch the determination of the will of the ſaid *C. A.* and *R. G.* or of either of them, as to the ſaid office of gaoler purſuant to the ſaid power hereby reſerved. *In Witneſs*, &c.

N° IX.

N° IX.

Bond for the executing of a gaolerſhip.

Obligation from R. A. *to* C. A. *and* R. G. *Penalty* 2000 *l.*

THE Condition, &c. That if the above bounden *R. A.* gaoler to the ſaid *C. A.* and *R. G.* ſheriff of the county of *M.* do from time to time receive and take into his ward and cuſtody within the gaol in the county of *M.* aforeſaid, all ſuch perſon and perſons, priſonet and priſoners, which ſhall be committed or ſent to the ſaid gaol, or any committed to the ward and cuſtody of the ſaid gaoler by the ſaid ſheriff or his deputy, or by any juſtice or juſtices of the peace, or by any other having lawful authority to commit perſons or priſoners to the ſaid gaol, and the ſaid perſons and priſoners, ſo committed as aforeſaid, do well and truly, duly and ſufficiently, by his own proper perſon, or by his ſufficient deputy or deputies, ſo keep, that the ſaid *C. A.* and *R. G.* and each of them, their and each of their heirs, executors, lands, tenements, goods and chattels be ſaved harmleſs from all loſſes, penalties, amerciaments and damages whatſoever, as well againſt our Lord the King as alſo againſt all other perſon and perſons of, for and concerning the cuſtody and keeping of the ſaid gaol, and priſoners; and likwiſe do diſcharge, ſave and keep harmleſs the ſaid *C. A.* and *R. G.* and each of them, their and each of their heirs, executors, lands, tenements, goods and chattels, from time to time, and at all times hereafter, of and from all and every eſcape and eſcapes, as well of convict perſons, reprieves and felons, as of all other perſons now committed for any contempts, condemnations, treſpaſſes or miſdemeanors, which may happen or chance hereafter to be committed to the ſaid gaol for any the cauſes aforeſaid, during the time the ſaid *C. A.* and *R. G.* or

either of them ſhall be ſheriff of the county of *M.* and likewiſe the ſaid *R. A.* or any other by his conſent, privity or appointment, in any wiſe let to bail or mainprize any priſoner or priſoners to him committed as aforeſaid, not bailable by the law of the nation, without the ſpecial commandment or appointment of the ſaid ſheriff, and if the ſaid *R. A.* or his ſufficient deputy be ready to give his attendance upon the ſaid ſheriff and his deputy at all times neceſſary and convenient, and all and every lawful thing and things that he ſhall be required to do by the ſaid ſheriff or his deputy, touching or concerning the affairs and buſineſs wherewith the ſaid ſheriff is or ſhall be charged or employed in or about the keeping of the ſaid gaol or priſon; That then, &c.

N° X.

The form of an indenture for ſetting over priſoners and writs between the old and new ſheriff.

THIS indenture made, &c. between *W. W.* eſq; and *S. T. F.* eſq; late ſheriff of the county of *M.* of the one part, and *C. A.* eſq; and *R. C.* eſq; now ſheriff of the ſaid county, of the other part, *Witneſſeth*, That the ſaid late ſheriff hath delivered, and the ſaid preſent ſheriff hath received from the ſaid late ſheriff, at the time of his going out of his office, the bodies of the ſeveral perſons hereafter named, charged with the cauſe or cauſes hereafter mentioned; that is to ſay,

P. C. was taken by *J. H.* the day of in the year of our Lord 17 by virtue of his majeſty's writ of extent, returnable before the barons of his *Exchequer* at *Weſtminſter* on the morrow of St. *Martin* then next coming, to ſatisfy our Lord the King 1500*l.* and 8000*l.* debt upon two ſeveral bonds, which writ is teſted the day of in the year of his

his now majeſty's reign, and is indorſed by *G. W.* then ſolicitor for taxes, thus; to levy 6888 *l.* and coſts. *Arbuthnot* and others.

I hereby acknowledge to have in my cuſtody the bodies of all the ſeveral priſoners herein before named (except) againſt whoſe names the word (diſcharged) is written in the margin of this deed; the priſoners in cuſtody being in number

Witneſs my hand the 28th day of *September* 1765.

Witneſs *R. A.* Gaoler.
J. S.
W. S.

N°. XI.

Writ for new election of one citizen for the city of Weſtminſter.

GEORGE the Third, by the grace of God, of *Great Britain*, *France* and *Ireland* King, defender of the Faith, *&c.* To our ſheriff of the county of *M.* greeting. *Whereas* Sir *P. W.* knight of the moſt honourable order of the Bath, was lately choſen one of the citizens for the city of *W.* in your county, for our preſent parliament, ſummoned to be holden at our city of *W.* the day of in the year of our reign, and from thence by our ſeveral writs prorogued to and until the day of in the ſame year, on which day our ſaid parliament was begun and held, and from thence by ſeveral adjournments and prorogations was adjourned and prorogued unto the day of and there now holden: *And whereas* the ſaid Sir *P. W.* being ſo choſen a citizen for the ſaid city as aforeſaid, is ſince dead, as by a letter of our right truſty and well-beloved councellor Sir *J. C.* baronet, ſpeaker of our lower houſe of parliament, more fully and plainly appears,

by means whereof our ſubjects of the ſaid city are deprived of one citizen to treat for the benefit of the ſame city in our ſaid parliament; *nevertheleſs*, we being unwilling that the commonalty of our kingdom in our ſaid parliament aſſembled to treat of buſineſs concerning us, the ſtate and defence of our kingdom and the church, from the aforeſaid cauſe ſhould be diminiſhed or leſſened, whereby thoſe affairs may not have a due end, *We command you*, that in the place of Sir *P. W.* within the city aforeſaid, one other fit and diſcreet citizen of the aforeſaid city (proclamation being firſt made of the premiſſes, and of the day and place) freely and indifferently, by thoſe who ſhall be preſent at the proclamation, according to the form of the ſtatute in that caſe made and provided, you cauſe to be elected, and the name of ſuch citizen (whether at the ſaid election he ſhall be preſent or abſent) to be inſerted in certain indentures to be thereupon made between you and them, who ſhall be preſent at ſuch election, and to cauſe him to come to the ſaid parliament, ſo that the ſame citizen ſo to be elected may have full power and ſufficient authority, for himſelf and the commonalty of the aforeſaid city, to do and conſent to thoſe things which in our parliament aforeſaid, by the common council of our realm (by the bleſſing of God) ſhall happen to be ordained upon the aforeſaid affairs; willing nevertheleſs that neither you nor any other ſheriff in this our kingdom in anywiſe be elected, and the election ſo made diſtinctly and openly under your ſeal and the ſeals of them who ſhall be preſent at ſuch election, certify unto us in our chancery forthwith, remitting to us one part of the aforeſaid indentures annexed to theſe preſents, together with this writ. *Witneſs* Ourſelf at *Weſtminſter*, the day of in the year of our reign.

Yorke and *Yorke.*

Wrote

Wrote upon the label to the ſaid writ as follows, *viz.*

To the ſheriff of the county of *M.* a writ for a new election of one citizen for the city of *W.*

Yorke and *Yorke.*

The execution of this writ in certain ſchedules hereunto annexed.

Sir *C. A.* knight, and Sir *R. G.* knight. } Sheriffs.

N° XII.

Precept from ſheriff of M. *to the bailiff of* W. *for the election of one citizen for the ſaid city.*

MIDDLESEX, Sir *C. A.* knight and Sir *R. G.* knight, ſheriff of the ſaid county, to the bailiff of the liberty of the dean and chapter of the collegiate church of St *Peter* at *W.* in the ſaid county, greeting. *Know* that I have received a certain writ of our lord the king to me directed, the tenor whereof followeth, [here follows the writ *verbatim*] And becauſe the execution of the ſaid writ belongs to you, therefore by virtue of the ſaid writ I require you, that you forthwith cauſe a citizen to be elected for the ſaid city in the Place of the ſaid Sir *P. W.* according to the command of the ſaid writ; and how this my warrant ſhall be executed you ſhall make known to me immediately after the ſaid election made, ſo that I may certify the ſame, together with the ſaid writ and this precept returned to our lord the king in his chancery forthwith. Hereof fail not; this is your warrant, given under

under the ſeal of my office, dated the day of 17

C. A. and R. G. } Sheriff

The execution of this precept appears in a certain ſchedule here under annexed.

T. C. Eſquire, Bailiff.

N° XIII.

The indenture of election.

THIS indenture made in the liberty of *W.* in the county of *M.* the day of in the year of the reign, *&c. Between* Sir *C. A.* knight, and Sir *R. G.* knight, ſheriff of the county of *M.* aforeſaid, of the one part, and *T. C.* eſquire, bailiff of the liberty of the dean and chapter of the collegiate church of St. *Peter's*, *W.* in the county aforeſaid, Sir *J. C.* baronet, Sir *R. G.* baronet, Sir *C. D.* knight of the moſt honourable order of the Bath, Sir *T. R.* and Sir *J. L.* knights of the moſt honourable order of the Bath, the honourable *W. L. G.* Sir *T. R.* baronet, the right honourable *T. H.* commonly called lord viſcount *D. F. F.* and *N. H.* eſquires, *F. F.* eſquire, Sir *W. J.* baronet, *C. B.* eſquire, *J. G.* eſquire, and many other citizens, burgeſſes and inhabitants of the city, town and borough of *W.* of the other part, *Witneſſeth*, That by virtue of a certain precept directed from the ſaid ſheriff to the bailiff, and ſewed to this Indenture, (proclamation of the premiſſes in the ſaid precept firſt mentioned, and of the day and place as in the ſaid precept is directed, firſt being made) the citizens who were preſent at the ſaid proclamation *have* freely and indifferently, according to the form of the ſtatute in that caſe made and provided, and according to the tenor

and

and effect of the aforeſaid precept, and of the writ in the ſaid precept recited, choſen one citizen of the moſt diſcreet and ſufficient of the city and liberty aforeſaid, (that is to ſay) the honourable *E. C.* eſquire, to which ſaid *E. C.* ſo elected, the aforeſaid citizens have given and granted full and ſufficient power for themſelves and the commonalty of the city, town, borough and liberty aforeſaid, to do and conſent to thoſe things, which at the ſaid parliament by the common council of the ſaid kingdom (with God's aſſiſtance) ſhall happen to be ordained upon the affairs in the ſaid precept ſpecified, according to the form and effect of the ſaid precept. *In witneſs* whereof as well the ſaid ſheriff as the aforeſaid bailiff, citizens, burgeſſes and inhabitants of the city, town, borough and liberty aforeſaid, to theſe indentures their ſeals have interchangeably put, the day and year firſt above-mentioned.

FINIS.

ERRATA:

Page 1.	*Line* 18.	dele *he.*
—— 347.	—— 30.	for *Chap.* 2. read *Chap.* 3.
—— 541.	—— 18.	after *taken*, add *upon them.*
—— 542.	—— 23.	after *M.* add *at or.*
——	—— 25.	after *deliver*, add *all.*
——	—— 31.	for *or precepts or*, read *proceſs.*
—— 543.	—— 10.	after *ſame*, add *and.*
—— 544.	—— 42.	for *terms*, read *time.*
—— 545.	—— 11.	before *in*, read *ſhall.*

APPENDIX.

and effect of the aforeſaid preceipt, and of the writ in the ſaid preceipt recited, chuſen one citizen of the moſt diſcreet and ſufficient of the city and liberty aforeſaid, (that is to ſay) the honourable E. C. eſquire, to which ſaid E. C. ſo elected, the aforeſaid citizens have given and granted full and ſufficient power for themſelves and the commonalty of the city, town, borough and liberty aforeſaid, to do and conſent to thoſe things, which at the ſaid parliament by the common conſent of the ſaid kingdom [illegible] God's aſſiſtance) ſhall happen to be ordained upon the affairs in the ſaid preceipt ſpecified, according to the form and effect of the ſaid preceipt, [illegible] whereof as well the ſaid ſheriff as the ſaid bailiffs, citizens, burgeſſes and inhabitants of the city, town, borough and liberty aforeſaid, to thoſe indentures their ſeals have interchangeably put, the day and year firſt above-mentioned.

FINIS.

ERRATA.

Page 1. Line 18. dele &c.

— 347. —— 30. for Geo. 2. read Chap. 3.

— 541. —— 18. after Wales, add alſo mem.

— 542. —— 20. after 14. add &c.

— —— —— 3. after deliver, add all.

— —— —— 31. for or preceipt or, read preceipt.

— 542. —— 10. after ſame, add and.

— 544. —— 24. for town, read mem.

— 545. —— 11. before in, read and.